No. 14590

United States
COURT OF APPEALS
for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(AND RELATED CASES)

APPELLANTS' BRIEF

VIRGIL CRUM,
CRUM & SMITH,
WILLIAM C. RALSTON,
911 Portland Trust Bldg.,
Portland 4, Oregon,
Attorneys for Appellants.

C. E. LUCKEY, U. S. Attorney for the District of Oregon,
United States Courthouse,
Portland, Oregon;
WALKER, LOWRY, Special Assistant to the Attorney General,
1500 Balfour Building,
San Francisco, California,
For Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-55

INDEX

TABLE OF CASES AND AUTHORITIES CITED

STATUTES

No. 14590

United States
COURT OF APPEALS
for the Ninth Circuit

MEARL C. TILLMAN and EMILY P. TILLMAN, husband and wife,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

(AND RELATED CASES)

APPELLANTS' BRIEF

STATEMENT

In 1949 fifty-two separate actions were filed against the United States Government in the District Court of the United States, for the District of Oregon, under the Tort Claims Act for damages resulting from the cutting of an underpass through the western dike of Peninsula Drainage District No. 2 (Denver Avenue Embankment) and the consequent destruction of its protection against high waters. All of the plaintiffs and appellants were landowners in said Peninsula Drainage District No. 2.

These damage claims were based on the fact that the District had as its western boundary and protection the Denver Avenue Embankment which by recorded instrument the landowners had the right to rely on; that the United States, acting through F.P.H.A., wrongfully, unlawfully, negligently and deliberately cut an underpass through the same, thus destroying its effectiveness without providing substitute protection as required by Oregon law.

Inasmuch as the liability of the United States for such damage was identical in every case but the amount of damages different in each case, it was stipulated and agreed by all parties that the cases would be consolidated and tried together as to the legal liability of the United States only and that if judgment be for the plaintiffs they would be tried separately as to the damages, whereas if judgment be for the defendant it would dispose of all cases without further proceedings. One case was selected as a typical case and the proceedings were had under that title.

The evidence submitted consisted of about 62 pages of the PTO and many, many exhibits. Of course none of this is disputed by either party but much of the PTO and most of the exhibits are immaterial, outside the issues, and mere surplusage. In addition to the PTO there was a little over one day's oral evidence, mostly expert testimony. As the appellants see it, there was little or no consequential dispute in this oral evidence on any material fact.

The issues in this case appear to the appellants to be very simple. First, whether the landowners in Peninsula Drainage District No. 2 had the right to rely upon the Denver Avenue Embankment which they had contracted for, and second, whether the destruction of this protection by the United States of America, acting through F.P.H.A. without procuring the authority of the Circuit Court of the County of Multnomah and substituting therefor equal protection as required by the Statutes of the State of Oregon, was wrongful, entitling the landowners in District No. 2 to recover their damages.

The District Court apparently agreed with the appellants on every legal principle involved but avoided these legal principles on factual findings, all of which the appellants contend are contradictory to the agreed evidence. Thus the questions involved here are practically entirely questions of fact. Appellants have found it necessary to assign as error practically every factual finding in the opinion of the District Court and the findings.

Peninsula Drainage District No. 2 was organized in September 1917. It included approximately 1425 acres of bottomland along the Columbia River in close proximity to Portland. It is very rich and productive bottomland and is valuable for homes and industries. It is subject (without dikes) to overflow annually from the waters of the Columbia. In the organization papers it is described by metes and bounds but is referred to more briefly as being bounded on the west by Denver Avenue Embankment, formerly known as Derby Street; on the north by Columbia River; on the south by Columbia

Slough, and on the east by an extension of Columbia Slough, sometimes called the City Cut, or McBride Slough.

The Columbia River heads in Canada and flows for some 460 miles before it crosses the border into the State of Washington. It drains this vast area in Canada and from this as far south as Nevada, and from the Continental Divide on the east to the Pacific Ocean, a total of approximately 259,000 square miles (PTO R. 14). The high water in the Columbia is caused by the melting snows in the mountain area and reaches Portland every year usually in May and June. The height of the water each year depends entirely on how much of this vast mountain area is thawed out at the same time and obviously there is always a potential extreme high water locked up in the accumulated winter snows drifted over this extensive mountainous country. What may be called normal floods occur annually. The higher and critical floods occur less frequently but with more or less regularity (PTO R. 45).

Many diking districts have been organized up and down the Columbia by landowners in an attempt to salvage this rich bottomland. In many districts, as in Peninsula Drainage District No. 2, the Government has assisted in strengthening and building up dikes to protect against the ravages of this annual high water. When there is a critical flood there is always a fight to protect these lands from breaks in primary or secondary dikes and Government Engineer Diblee in his report on the 1948 flood (Ex. 66, R. 454) stressed the necessity of all pos-

sible precautions being taken including the elimination of the Denver Avenue Underpass which is the controversy in these actions.

In 1915 Peninsula Industrial Co. was the owner of the land on which Denver Avenue Embankment was later constructed as well as the land on both sides. On March 16, 1915 a deed was executed of an eighty foot strip of land for Denver Avenue (at that time known as Derby Street) running from Columbia Slough on the south to the bridge approach on the north (PTO R. 23, Ex. 68 R. 455). The sole consideration for the deed was the agreement contained therein, including an agreement on the part of the County for itself and successors to construct within three years and thereafter maintain an unbroken embankment across the same that would duplicate the bridge approach to the bridge crossing the Columbia River at the north end of such deeded strip.

This deed contained mutual easements. The County was given the right for itself and successors to slough over the toe of the fill on either side so much as necessary to maintain the embankment and the easement to use this toe on either side on private ground to maintain the embankment and the highway thereover. The grantor (Peninsula Industrial Co.) and its successors thereby retained the ownership of the embankment outside the 80 foot strip, subject to the easement of the County to use the same for a highway over the top and with the obligation of the County and its successors to maintain the same. In addition the grantor and its successors were given an easement to use the entire embankment and

hook on to it so long as it did not interfere with the right of way over the top. This deed was recorded in Multnomah County Deed Records, on March 26, 1915, in Book 687, at page 39 (R. 455). The highway was taken over by Oregon State Highway Commission by Resolution of its own Commission in 1937 (PTO R. 28).

The embankment was ultimately brought to a height of 37.6 feet with a crown width of 92 feet, of which 56 feet was paved, a base width of 317.6 feet and slopes of 1 foot to 3 feet (PTO R. 22). This leaves 118.8 feet of the embankment on each side belonging to private interests subject to the easement of the County and to its successors to use it for a highway over the top but with the condition they maintain it. This 118.8 feet could only be used by the County and its successors to maintain the fill, not to use it for road purposes.

By 1917 the fiill had been constructed but not to its present height. In June 1917 Peninsula Drainage District No. 1 was organized taking in the land west of Denver Avenue and using that fill as its eastern boundary (PTO R. 25). By September 1917 there were 46 different owners of land making up what is now Peninsula Drainage District No. 2 (Ex. 26, R. 382). During that month District No. 2 was organized by these 46 owners making Denver Avenue embankment its western boundary. They asked and procured authority from the Court to build dikes to 28 feet around the other three sides, which was done (Ex. 26, R. 322).

There was no connection whatever between these two Districts except District No. 2 drained its surface water

at that time through a five foot culvert under Denver Avenue to a point in District No. 1 where the waters from both districts were pumped into Columbia Slough by a jointly owned pumping plant (PTO R. 25). This was temporary and later done away with.

December 21, 1926 a new deed was given by Peninsula Industrial Co. to Multnomah County to correct the description in the first deed (Ex. 69, R. 465). This second deed was identical with the first deed except for the description, and reaffirmed the mutual easement agreement and the agreement on behalf of Multnomah County for itself and successors to maintain the embankment. This deed was also recorded in Multnomah County Deed Records on December 31, 1926. Book 182, p. 298 (Ex. 69, R. 465).

In 1928 a reorganization plan was filed in the Probate Department, Multnomah County Circuit Court, by the Supervisors of District No. 2 (PTO R. 25). They represented to the Court that their western boundary, Denver Avenue Embankment, had been built to a height of 33 feet. That Multnomah District No. 1, to the east (not to be confused with Peninsula Drainage District No. 1 to the west) had built its dikes to a height of 32 feet. They asked and received the authority to build the north, south and east dikes to 33 feet to afford the same protection as Denver Avenue embankment at 33 feet. They also asked and received the authority to assess the land in District No. 2 $25 per acre to cover the expense (PTO R. 27). No mention whatever was made in this proceeding of Peninsula Drainage District No. 1.

Following this reorganization plan and in compliance therewith District No. 2 with aid of the government authorized by Act of Congress, rebuilt and strengthened its north, south and east dikes to a height of 33 to 35 feet (PTO R. 19).

During the same period the Highway Commission increased the size, height and strength of Denver Avenue embankment to a height of 37.6 feet, width at base of 317.6 feet, crown width of 92 feet, with 56 feet of pavement (over 3 times the size and strength of the strongest of the primary dikes) (PTO R. 22).

At the same time the culvert through Denver Avenue was plugged by the W.P.A. under government engineers' (Appendix B) supervision and a new pumping plant put in by District No. 2 entirely within its own borders, pumping its surplus waters into Columbia Slough. Thereafter there was no connection whatever between Districts Nos. 1 and 2.

Peninsula Drainage District No. 1, in which the F.P.H.A. built its housing project did not surround its district with dikes. It adopted Denver Avenue embankment as its eastern protection, built dikes on the north and south but on the west it hooked on to railroad fills over which it had no authority whatsoever (PTO R. 35). They were entirely within the control of the railroads and the District had no authority to strengthen or protect them or to hook onto them. The S. P. & S. fill which broke during the 1948 flood was built in 1907-1908 (PTO R. 38). A wood trestle was built from which dry sand was hauled and dumped over the trestle. The stringers

in the trestle were removed but the piling was not. No showing was made that there was ever an intention to make this a water repellent structure, in fact it was built ten years or more before the organization of Peninsula Drainage District No. 1 during which time it was not subjected to side water pressure. Therefore there was no reason for making it water repellent. The building of the north and south dikes by District No. 1 subjected this railway fill to side water pressure by permitting the water to flow on but one side. This they are not shown to have had any right to do.

During the ten year period prior to the high water of 1948, Peninsula Drainage District No. 2 was completely put under cultivation and improvements. There were many buildings and industries built, including Portland Meadows Race Track with its expensive buildings, an auto track with its buildings, an open-air theater, a golf course, a building material business, other businesses and industries, a great many homes, many of them fine expensive homes, and a grade school (Ex. 66, R. 450).

There is no evidence to show what happened in Peninsula Drainage District No. 1 except that the evidence shows that the United States was able to acquire a mile square of land upon which Vanport was built (PTO R. 46) and that the industries along the north side were built on high ground and were originally outside the District (PTO R. 33).

There is no evidence as to why the development in District No. 2, and not No. 1, except from inferences which may be drawn from the facts. It would be difficult

and perhaps impossible to produce specific evidence on this point. The inferences, however, appear to be quite clear to the appellants.

That inference would be that the people in District No. 2 depended upon and had confidence in and had the right to the protection afforded by the Denver Avenue embankment, while the people in District No. 1 had little or no confidence in the railroad fills and no right to use them.

On October 20, 1942, Kaiser Co. Inc. having a contract with the United States to build Vanport, subcontracted the work of building an underpass through Denver Avenue embankment to Tower Sales & Erecting Co. (PTO R. 49). The work on this underpass started on or about November 2, 1942 (PTO R. 49). On November 12, 1942 (ten days after work had begun on the underpass) a contract was made between F.P.H.A. and the State Highway Commission whereby F.P.H.A. was given permission to construct an underpass through Denver Avenue embankment to afford access to the F.P.H.A. housing project in District No. 1. F.P.H.A. by the same instrument agreed to construct the underpass and to pay the upkeep. This contract shows the underpass to have been a private way to Vanport and no part of a public highway (Ex. 23, R. 293). It had no connection with District No. 2.

The Statutes of Oregon provided as follows:

Section 123-216 O.C.L.A. — ORS 551.140

"REALIGNMENT OF DIKES BY LANDOWNERS: PROCEDURE; EXPENSE: OWNER-

SHIP OF NEW DIKE. Any person through whose lands dikes shall have been constructed under this act may be allowed to construct a dike upon new lines between any two points on the original line. In such case the owner shall file application with the county court, giving a plat of the proposed change, and indorsed by the superintendent of the district. If the court is satisfiied that the change is not detrimental to the district, the application shall be granted. The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

(Section 123-216 was made applicable to Drainage Districts by Section 123-206 O.C.L.A.)

No proceeding was taken or attempted under this Statute, and it was entirely ignored by the Court. The underpass was cut with no authority whatever except permit from State Highway Commission, which had no authority whatever to give such permission or to cut any such underpass on its own account. It was cut in violation of the landowners' easement, and that easement and the protection District No. 2 had from Denver Avenue embankment was completely destroyed. The government's expert witness, Mr. Willard J. Turnbull, testified it would be unsound to take out a secondary dike that was in place (R. 244).

On or about February 19, 1943, F.P.H.A. started construction of a ring levee with the ostensible purpose of

protecting the underpass. It was completed during April of 1943 (PTO R. 50).

This ring levee was 800 feet in length. It was constructed on land condemned by the United States on the east side of Denver Avenue to the 80 foot highway strip as its western boundary, and running north and south from the underpass. In the Declaration of Taking (Ex. 78, R. 471) it was recited that title in fee to this property was claimed, *subject to the easement of District No. 2.*

F.P.H.A. undertook to maintain the ring dike after it was built. H.A.P. took over the operation of Vanport for F.P.H.A. and it was their duty to regularly inspect and maintain the ring dike (PTO R. 53). In 1944 cracks and sloughs showed up in the ring dike. It was repaired by filling the cracks. Inspections continued until the 1948 flood and no other defects were observed by H.A.P. employees.

However, Mr. Kenneth R. Diblee, the Government Engineer, in his completion report (Ex. 66, R. 449) said:

> "This protective levee had a longitudinal crack extending along the top of its northerly portion, which was reported to have formed not long after original construction was completed."

At the time the cracks showed up in 1944 two employees of H.A.P. obtained the services of a government engineer and on his report they reported to F.P.H.A. that the ring dike was inadequate. It would require $9000 to bring it up to standard. They reported this to F.P.H.A. but were scolded for their interference and that work was not done. These two employees were Donovan C.

Byers (Ex. 32, R. 354, 363) and Clinton S. McGill (Tr. R. 192, 193).

This ring dike was constructed of dry sand. In the fall of 1943 more work was done on this levee increasing its height to 34.9 feet with a crown width of 12 feet at the north and gradually reducing in width to 7.5 feet. The inside or western slope had a slope of 1 foot on 2 feet, the outside or eastern 1 foot on 1½ feet. The average base width 100 feet. The eastern slope had a clay blanket 3 feet in thickness to protect it from waters approaching from the east. There was no such blanket on the west to protect it against waters from the west. An 18 inch pipe or culvert was placed beneath this ring dike to drain waters from west to east. A flood gate was placed on the eastern end to prevent flood waters from District No. 2 on the east flowing through into District No. 1 on the west. There was no similar protection given to District No. 2 from flood waters flowing from west to east (PTO R. 50, 52).

It isn't even contended by the United States that this ring levee gave any protection to District No. 2. In fact they take the contrary position that it was never so intended. Their contention No. 41 (PTO R. 100) reads as follows:

> "That no agency or employee of the United States was authorized or instructed by Congress to build or maintain the ring levee for the benefit of plaintiff or to provide flood protection of any kind to plaintiff; and nothing any employee of the United States did or did not do in that connection was within the scope of his employment."

Their contention No. 23 (PTO R. 96) says it was intended to protect the Vanport residents and the $25,000,000 investment of the United States in Vanport.

The United States produced no witness who engineered the construction of this ring dike nor anyone who had charge of it or knew why it was built or for what purpose. They produced two expert witnesses, Mr. Willard J. Turnbull of Vicksburg, Mississippi, and Mr. Thomas A. Middlebrook of Alexandria, Virginia. Each testified that judging from its construction it was built to protect the government's investment in Vanport against waters topping the dikes around District No. 2, which were 1.7 feet lower than the dikes around District No. 1. They each testified it was not constructed to protect against water coming from the west (Tr. R. 226, 239).

So it is clear that the ring dike never was and never intended to be, nor is there any contention on the part of the United States, that it was adequate to give any protection to the landowners in Peninsula Drainage District No. 2. It was, however, sufficient in size when compared to the outside dike to afford apparent protection. The defects in it which made it useless against waters from the west were hidden and concealed and not apparent to the layman's eye. The inference must follow that the construction of the ring dike and its maintenance until the flood in 1948 was sufficient to lull the landowners in District No. 2 into a sense of security and encouraged them into continuing with building and improvements in reliance on the protection the United

States was giving them. This is particularly true in view of Section 123-216 O.C.L.A., ORS 551.140, above quoted, which placed a duty on the United States to substitute equal protection to the Denver Avenue embankment. In any event the District No. 2 landowners were given no choice but to rely on this ring levee for protection. The underpass could only be protected by a ring dike. The United States owned the land on the west and condemned the land on the east for the very purpose of constructing a ring dike to protect the underpass. Thus the landowners in District No. 2 were deprived of any possible way whatever of protecting themselves.

Prior to the construction of this underpass the Denver Avenue embankment had always been preserved for the protection of both districts, Peninsula Drainage District No. 1 and Peninsula Drainage District No. 2. Mr. Baldock, Chief Engineer for the State Highway Commission, testified that he knew these districts claimed the Denver Avenue embankment as a dike (Tr. R. 251). He denied they had the right to rely on it but had never seen the deed under which that right was given. However, the Highway Commission built two other underpasses through the embankment. One was at the south end by Columbia Slough to permit travel off Gertz Road. In this instance the south dike in District No. 2 was moved to the north by the Highway Commission and reconnected with the Denver Avenue embankment to permit the underpass to be placed outside the dike and thus preserve the Denver Avenue embankment (PTO R. 29). By doing this the Highway Commission had to recognize the Denver Avenue embankment as a dike.

Later the Highway Commission placed an underpass at the north end in connection with a traffic interchange near the bridge. In that instance the Denver Avenue embankment was preserved by using the high ground and filling in from Union Avenue to North Portland Road, and from Denver Avenue to North Portland Road (PTO R. 28). This resulted in a lowering of the embankment at that point by approximately 4 feet making it 33.6 feet (slightly more than the outside dike). The PTO also mentions 31 feet but this was apparently an error and was caused by deducting 4 feet from the height of the fill as alleged in the complaint to be 35 feet. The actual height of the fill, however, was 37.6 feet making the lowering to 33.6 feet. At any rate no water topped the embankment at this point and the flood was reported to have reached 32.44 feet (PTO R. 79).

On May 30, 1948, a section of the S. P. & S. railroad fill on the west of Peninsula Drainage District No. 1 broke permitting the flooding of that district. What happened then is best told by Government Engineer Kenneth R. Diblee in his completion report (Ex. 66). We quote from that portion of this report which was not printed in the Transcript of Record. On page 13 of said report we find the following:

> "At approximately 4:30 p.m. on May 30, 1948, the S. P. & S. Railway embankment forming the westerly levee of Peninsula Drainage District No. 1 blew out causing that district to fill quite rapidly. Water filled the underpass through Denver Avenue and as it deepened therein Diblee noted that on the inside toe of the circular dike protecting the underpass a gusher developed which appeared to be a

manhole of approximately 30 inches in diameter which gushed to an approximate height of about 2 feet above ground level. Attempts were made to plug this with sandbags but it was impossible to stop it. South of this gusher an apparent 8-inch pipe started flowing."

Quoting from page 15 of the same report, we find the following:

"* * * and the circular dike around the underpass through Denver Avenue was being worked on by first attempting to place a sandbag layer on the outside slope to give the fill more weight, but as this was deemed a very dangerous operation by Mr. H. K. Doyle and Mr. Baldock, Oregon State Highway Engineer, this method was discontinued and an attempt was made to fill the underpass opening by trucking in sand and gravel material and dumping it on the underpass roadway."

And at the bottom of page 15, we quote the following:

"B. *Date of Occurrence and Description of Major Break and Flooding of Area*—At approximately 9:00 p.m. on May 31, 1948, the semi-circular levee around the underpass through Denver Avenue gave way, immediately widening due to the great velocity of flow until it ultimately was approximately 400 feet wide. The water from the Vanport area poured into the area of Peninsula No. 2 between Denver and Union Avenues filling it quite rapidly. Buildings afloat in the Vanport area were carried through the breach into the other area.

As Peninsula No. 2 had been evacuated on orders of the Multnomah County Sheriff soon after the Vanport disaster on May 30, 1948, there was no loss of life occasioned by the filling of the area between Denver and Union Avenues."

And from subdivision V, page 17, we quote the following:

> "Property damage to buildings was very great, as many one-story buildings were floated from their foundations and carried away. Other buildings which were not moved were partially immersed resulting in the warping of siding and flooring, ruining of plaster walls and the water staining of all parts immersed. Shrubbery around homes and crops were practically 100% ruined. A very few houses along Marine Drive built on high foundations or on high ground escaped flood damage. Columbia-Edgewater Club House suffered considerable damage to its basement from immersion and the golf course was totally immersed killing the grass cover."

JURISDICTION

These are actions for the recovery of damages from the United States of America under the Federal Tort Claims Act. The causes of action arose May 31, 1948, being the date of the flooding of Peninsula Drainage District No. 2 in Multnomah County, Oregon.

This flooding was caused by the cutting of an underpass by the United States Government through F.P.H.A. without providing equal protection against floods for District No. 2. These actions were filed in the United States Court, for the District of Oregon, within two years after the rights of action arose. Jurisdiction over these actions in the District Court is provided under 28 U.S.C.A. 1346(b). Judgment in favor of the appellee and against the appellants was entered September 14, 1954 (R. 148). Notice of Appeal was filed November 9, 1954 (R. 149). Jurisdiction of this Court to hear and determine this appeal is conferred by 12 U.S.C.A. 1291.

ASSIGNMENTS OF ERROR

An explanation seems necessary as to our first assignment of error. The Court in the first paragraph of its Findings of Fact adopts the Findings of Fact in the opinion of the Court and the Findings of Fact set forth in paragraphs 1 to 20, inclusive of Section C of the Pretrial Order. The Findings of Fact in the Pretrial Order, in the opinion of the appellants, would support only a judgment in favor of the appellants, whereas the Findings of Fact set forth in the opinion are found by the Court to support a judgment for the defendant. Every statement of fact contained in the opinion of the Court is, we believe, contradicted by statements of fact in the Pretrial Order. This leaves the findings in such a nebulous state we find it extremely difficult to point out specific error. It seems necessary to counsel, therefore, in view of this finding to point out the errors in the factual findings in the opinion.

In the opinion as it appears to the appellants, the Court attempts to find Peninsula Drainage District No. 2 adopted the railroad fills on the west side of Peninsula Drainage District No. 1 (which the Court refers to as the western embankment) as its protection on the west and that the breaking of the railway fill was the cause of the flooding of District No. 2. That it never depended on the Denver Avenue Embankment. By adopting this erroneous theory it seems to have become necessary in the Court's opinion to make further findings of fact that Denver Avenue Embankment was merely an after-

thought and was not intended as a dike; that it was never adopted; that it wasn't sufficient to act as a dike, etc. in order to discredit and eliminate the Denver Avenue Embankment from consideration, all of which findings were erroneous and contradicted by the PTO. We will attempt to point out the erroneous findings in the opinion of the Court, subdividing and grouping them as follows:

(a) The Findings as to Peninsula Drainage District No. 2 adopting the railway fill for its western protection, and

(b) The Findings tending to discredit and eliminate the Denver Avenue Embankment from consideration.

With this explanation as to appellants' assignments of error as to paragraph I of said Findings of Fact, the appellants make the following

ASSIGNMENTS OF ERROR

I

The Court erred in adopting the Findings of Fact in the Court's opinion and at the same time adopting Findings of Fact in the PTO without specifically setting forth such findings. More specifically appellants assign as error the following factual findings set forth in the opinion of the Court.

(a) The Court erred in the following factual findings set forth in its opinion, on page 1 of said opinion (R. 127) as follows:

Par. 1 "The consideration of the deed to this strip was the erection of a mound carrying a highway which was to be maintained by the county. In accordance therewith, a highway, one of the approaches to the Interstate Bridge across the Columbia River to Vancouver, Washington, was placed on this bank."

And on page 2 of said opinion (R. 128) the following:

Par. 2 "District No. 1 was protected from flood on the north, west and south by railroad fills and by constructed levees, none of which was owned or managed by the United States. These same works protected District No. 2 on its western side. District No. 2 built dikes between 1917 and 1921 on its north, south and east sides, which connected with the works of District No. 1 above described, and thus accomplished complete circumvolution of both. Neither district spent time or money in attempting to strengthen the mound carrying Denver Avenue."

And again on page 2 (R. 128) as follows:

Par. 3 "The United States, also pursuant to congressional authority, rebuilt the north and south levees of District No. 1. Notwithstanding the plans for the work were approved by District No. 1, there was no suggestion from anyone that the western embankment, owned and in control of the railroads but adopted by both districts as an existing work, should be reconstructed or strengthened by the United States."

And on page 6 (R. 132), as follows:

Par. 4 "District No. 2 adopted the western embankment as one of its guards against overflow, as it did the other works which primarily defended District No. 1.[7] This the District had a legal right to do under the statutes of the state.[8] The breaking of the western embankment upon which these landowners relied for safety was the sole cause of disaster."

Note No. 7 referred to above, set forth at the bottom of page 6 of the Court's opinion (R. 132), reads as follows:

Par. 5 "The Plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected 'by its west, north, and south levees, connecting with system No. 2'. District No. 2 planned to construct levees on the east, north and south. The Plan concluded, 'It is apparent that this will affect a complete closure of the land included in this district against high water.' "

(b) The Court erred in the following factual findings in its opinion tending to discredit and eliminate the Denver Avenue Embankment as protection for Peninsula Drainage District No. 2.

On page 3 (R. 129) of said opinion, the following finding:

Par. 1 "The State Highway Commission which had already constructed two underpasses[2] in Denver Avenue, was requested to and did build with federal funds an underpass through the fill for the convenience of persons living in both drainage districts. No protest was made by District No. 2, nor any suggestion by anyone that District No. 2 needed protection from waters from the west. It is true, a resolution mildly suggesting that objection to the construction of the underpass without a 'stop log' was passed by its board of directors and placed among the minutes of the Board, but it seems never to have been called to the attention of anyone outside this group."

Note No. 2 referred to by the Court and appearing on the bottom of page 3 (R. 129), reads as follows:

Par. 2 "One of these was not within the boundaries of the levee systems of Districts Nos. 1 and 2, and in the other affected the system in no way but to lower the Denver Avenue fill by four feet."

Continuing with the next paragraph on page 3 (R. 130):

Par. 3 "However, upon protest of District No. 1, a ring levee was built on land condemned by the federal government at the opening of the underpass upon the upriver side in District No. 2. The purpose of this ring levee was to afford some protection to District No. 1 from overflow by floodwater from the east if the dikes of District No. 2 were overtopped. As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers. This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when the western embankment failed.

"On May 30, 1948, between 4:00 p.m. and 4:30 p.m., in one of the greatest floods of the Columbia River in recorded history, the western embankment, which was the railroad fill adopted by these districts, failed, permitting the water flooding to overflow that area. The waters were held by the Denver Avenue highway fill until between 9:00 p.m. and 10:00 p.m. on May 31, 1948, when the ring levee constructed on the east of the underpass to protect District No. 1 from water approaching from that direction failed, and, as a result, District No. 2 and the properties of plaintiffs were inundated.

"This is a case of afterthought, not forethought, on the part of plaintiffs and District No. 2."

Continuing with the second paragraph on page 6 (R. 130), the Court found:

Par. 4 "The government did not construct or have control over Denver Avenue or the bypass, although this was built with federal funds, and the ring levee stood on lands which it had condemned. Denver Avenue was not designed as a water repellent wall.[10] It is

specifically stated that no reliance was placed upon it, and it is mentioned only casually as furnishing additional protection. In fact, it did so even in this disaster. But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke."

Note No. 10 at bottom of page 6 (R. 133), referred to in this statement, reads as follows:

Par. 5 "Plaintiffs contend that language of the deed from Peninsula Industrial Company to Multnomah County establishes their right to have Denver Avenue maintained as a dike. They place their reliance on the following: '* * * this conveyance is made upon the following express conditions: * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *"

Continuing on page 7 (R. 134), the Court said:

Par. 6 "It is true that one who destroys a dike against flood waters would be liable for damage proximately caused thereby. But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything with either Denver Avenue or the western embankment. All this time, the District possessed sovereign power of eminent domain and assessment for these express purposes. Therefore, the cutting of the underpass and the failure to provide unbreakable work may have been a condition which resulted in damage, but it was not a cause, proximate or otherwise." (We do not assign the first sentence here quoted as error.)

On page 9 of said opinion (R. 137), the Court found as follows:

Par. 7 "Here, the United States is not liable. The government owed no duty to these landowners. The employees of the Portland Housing Authority are not shown to have done anything legally significant. The United States was not responsible for the failure of the western embankment, which was the sole cause of disaster. The government had not deliberately banked waters high over the lands of plaintiffs and permitted these to overflow. No liability was thus established by creating a highly dangerous situation. These were flood waters and were not part of a column of water which agents of the government were conducting when the break occurred. So there could be no trespass. The government agents were not in control of the waters so that the doctrine of res ipsa loquitur would apply. No act or omission was proved which constituted negligence on the part of any agent of the government. Finally, the United States is not liable for damage caused by flood.

"Findings, conclusions and judgment in accordance herewith and in favor of the United States should be drawn by the attorneys and submitted to the Court."

The appellants assign as error all of the Findings set forth above and all of the findings of fact contained in the said opinion of the Court which were in contradiction with the PTO and the evidence.

II

The Court erred in its Finding No. 3 of the findings of fact (R. 140) in that portion thereof which reads as follows:

"District No. 2, in which plaintiffs owned property, adopted these works (which primarily protected District No. 1) as protection for District No. 2 from the west. On the north, south, and east District No. 2 built dikes which connected with the works of District No. 1, thus accomplishing a complete circumvolution of both districts. None of these fills, dikes and levees was owned or controlled by the United States."

III

The Court erred in Finding No. 4 of said findings of fact (R. 141) as to the following portions thereof:

"For the convenience of persons living in both districts an underpass through the Denver Avenue fill was built with federal funds. * * * No protest against construction of the underpass was made by District No. 2. A resolution mildly suggesting objections to the construction of the underpass without a stop-log structure was passed by its board of directors, but it seems never to have been called to the attention of anyone outside that group."

IV

The Court erred in Finding No. 5 of said findings of fact (R. 141) as to that portion thereof which reads:

"Upon protest of District No. 1, a ring levee was built, on land condemned by the United States, at the opening of the underpass upon the upriver side and in District No. 2. * * * As a matter of actual fact the ring levee also afforded some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when on May 30, 1948 the western embankment of District No. 1 failed."

V

The Court erred in its Finding No. 7 of said findings of fact (R. 142) as to the following portions thereof:

"The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs. That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. * * * "

VI

The Court erred in Finding No. 8 of said findings of fact (R. 142) as follows:

"Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure. The Plan for Reclamation of District No. 2 specifically stated that no reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection. Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue. * * * Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue as a levee or for flood protection purposes."

VII

The Court erred in Finding No. 9 of said findings of fact (R. 143) as follows:

"In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. No one contemplated Denver Avenue as a bulwark against a weight of water such as was cast against it when the western embankment at District No. 1 broke. The failure of the ring levee and the inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, includ-

ing plaintiffs, and which in the exercise of due care could not have been foreseen."

VIII

The Court erred in Finding No. 10 of said findings of fact (R. 144) in making the following finding recited therein:

"District No. 2 at no time contributed to the construction or maintenance of Denver Avenue, and during the entire period of approximately six years between the time when the Denver Avenue underpass and ring levee were constructed and the time of the 1948 flood, District No. 2 did nothing with respect to Denver Avenue, the underpass or the ring levee. District No. 2 and not the United States had the duty of providing flood protection for lands within the District. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands. The construction of the underpass and the failure to provide an unbreakable ring levee was not the cause, proximate or otherwise, of any damage to plaintiffs."

IX

The Court erred in its Finding No. 12 (R. 145), which reads as follows:

"The employees of the Housing Authority of Portland are not shown to have done anything legally significant. Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the Housing Authority or its employees."

X

The Court erred in its Finding No. 13 (R. 145) which reads as follows:

"Plaintiffs have failed to prove any negligence or wrongful conduct on the part of the United States

or its employees or that plaintiffs suffered damage on that account."

XI

The Court erred in its Finding No. 14 (R. 145) which reads as follows:

"Plaintiffs have failed to prove that the construction of the Denver Avenue underpass or the construction or maintenance of the ring levee surrounding that underpass violated any right of plaintiffs, that the ring levee was inadequate for the purpose intended or that, under the circumstances, the purposes for which the ring levee was constructed were not the proper purposes."

XII

The Court erred in its Finding No. 15 (R. 145) which reads as follows:

"The contentions of plaintiffs as set out in the pretrial order that the construction of the Denver Avenue underpass was negligent, wrongful and a trespass on plaintiffs' property, that the Denver Avenue fill constituted a levee and, as such, part of the plan for reclamation of District No. 2, that plaintiffs relied on the Denver Avenue fill as security against flood waters, that the ring levee around the Denver Avenue underpass was inadequate and unsuitable for the purpose intended, that the ring levee was negligently maintained and constituted a nuisance, and that the County of Multnomah and its successors in interest had an obligation to maintain the Denver Avenue fill as a dike, have not been proved."

XIII

The Court erred in its Finding No. 16 (R. 146) which reads as follows:

"The United States has proved facts sufficient to establish that it had no duty to protect plaintiffs or

their property, that nothing done or left undone by the United States or its employees constituted a violation of any right of plaintiffs, and that there is no proof of any wrongful act or omission on the part of the United States or its employees."

ASSIGNMENTS OF ERROR IN THE CONCLUSIONS OF LAW

XIV

The Court erred in its Conclusion No. 1 (R. 146) adopting its Conclusions of Law set out in the opinion of the Court.

It is perhaps unnecessary to go into the Conclusions of the Court in the opinion as the same conclusions seem to be repeated in the Conclusions of Law signed by the Court.

XV

The Court erred in its Conclusion of Law No. 5 (R. (146) in its entirety, which reads as follows:

> "Under the law of Oregon the legal duty to protect plaintiffs' property from flood damage rested on Peninsula Drainage District No. 2 and on plaintiffs themselves as land owners within the district. This duty was continuous and involved the repair, maintenance and strengthening of existing flood protection structures. Neither the United States nor its employees owed plaintiffs any duty to protect plaintiffs' land from overflow or flood damage."

XVI

The Court erred in its Conclusions of Law No. 6 (R. 147) in its entirety, which reads as follows:

"The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had casual connection with any damage to plaintiffs' property."

XVII

The Court erred in its Conclusion of Law No. 7 (R. (147) which reads as follows:

"Neither the United States nor its employees has been proved to be guilty of negligence or wrongful conduct within the meaning of the Federal Tort Claims Act."

XVIII

The Court erred in its Conclusions of Law No. 8 (R. 147) which reads as follows:

"The provisions of 33 U.S.C.A. 702(c) that "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place" is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River Basin; and it is not repealed by the Federal Tort Claims Act."

XIX

The Court erred in its Conclusion of Law No. 9 (R. 147) which reads as follows:

"The United States is entitled to judgment."

XX

The Court erred in its concluding paragraph of said Conclusions of Law (R. 148) which reads as follows:

"These findings of fact and conclusions of law are in accordance with the pretrial order, the record made on the trial of the actions and the opinion of the Court heretofore filed in these consolidated cases.

SUMMARY OF ARGUMENT

We wish to call the Court's attention to the very excellent and instructive opinion of the Court in Clark vs. United States, 13 F.R.D. p. 342, wherein the Court said, at page 345:

> "When a plaintiff has by his counsel advised the Court and defendant of the theories upon which he relies and has given account of these, then the Court should not adopt some other theory of recovery, even if it should be believed that such a theory was more applicable. The other side has also a right to rely upon the theory stated by the counsel for the plaintiff, and it is entire justice to require the defendant to accept some theory of law propounded by the Court for the first time in the opinion. Likewise, the defense in these cases very carefully sets up theories of defense. Here also the same considerations prevail. The defendant should be bound by such theories as well as the plaintiff, and the Court should not find some other ground on which to deflect the attack. If it should be believed either by the trial judge or the appellate judges that the theories are incorrect and do not fit the facts, then the case should be remanded for the purpose of drafting a new pre-trial order and these things should then be set forth. In this instance, it is believed that the pre-trial order covers very exactly both the theory of recovery and the theories of defense."

In the instant case the issues were very simple and very clear. The plaintiffs contend in their pleadings and in the PTO that District No. 2 adopted for its western boundary and protection the embankment supporting the Denver Avenue highway. That it was wrongfully destroyed by the cutting of an underpass by F.P.H.A. with-

out protecting it as required by the laws of the State of Oregon. The appellee set up many defenses trying to excuse its conduct. There was no contention on either side and nothing within the PTO in which an issue could be adopted to the effect that District No. 2 had for its western protection the railroad fill, a mile or two to the west ,outside of the District, over which it had no jurisdiction whatsoever. No evidence was introduced. Nothing appeared in the PTO and no contention was made that the appellee had any responsibility for the breaking of the railroad embankment nor that District No. 2 put any reliance thereon. That simply was not within the issues.

We believe there could be no better demonstration of the wisdom of the quotation from Clark vs. U. S. supra than the instant case.

Here the Court has adopted an entirely different theory than was presented by either the appellants or the appellee and entirely different from anything that could be taken from the PTO, and that is that District No. 2 depended upon the railroad fills a mile or two outside the District for protection from the west and since the appellee was not responsible for the breaking of that fill it was not responsible for the damage that resulted to the appellants from the destruction of the Denver Avenue Embankment.

We are unable to understand the adoption of this theory by the District Court except that that was the identical theory underlaying the so-called Vanport cases involving the flooding of District No. 1. The Court in

those cases, as shown by his excellent opinion, made a very thorough diagnosis. It seems to counsel for appellants that the decision in this case was written on the assumption that the same theory was involved. In order to uphold such a theory it became necessary to eliminate the Denver Avenue Embankment located on the western border of District No. 2 completely and to handle the matter as though District No. 1 and District No. 2 were in fact one and that neither District relied on the Denver Avenue Embankment any more than if it was not there.

The result of this change in the issues was that practically every legal point involved was determined in favor of the appellants but the results thereof avoided by Findings of Fact contrary to the evidence contained in the PTO, which of course is not subject to dispute. In the testimony taken there was little or no dispute and certainly it is believed by appellants that there was no dispute of any materiality.

Practically all of the Findings of Fact are believed by the appellants to be in direct contradiction to the undisputed evidence contained in the PTO. We have assigned as error practically every factual finding that was made in the opinion as well as in the Findings of Fact. In the Findings of Fact the Court adopted the factual fiindings in its opinion so it appears to the appellants necessary to assign these factual findings in the opinion as error.

For the reasons just stated this brief must necessarily apply principally to the facts as it is believed that a correct finding of the facts in accordance with the undis-

puted PTO will necessarily resolve all legal points in favor of the appellants.

The only way we have been able to classify these findings is by the substance. The factual findings run throughout the opinion as well as the findings of fact and in many different places refer to the same substance. In many instances two or more matters of substance are referred to in the same paragraph and sometimes in the same sentence. Therefore, we have had to jump from here to there to gather these factual findings in the opinion and findings of fact in order to treat them together. We have tried to classify these as follows:

THE COURT FOUND THAT:

1. Peninsula District No. 2 adopted as its western protection the railway fills on the west, a mile or two outside the District, and that was the cause of the flooding of District No. 2, although that was not within the issues of the case and is contradicted by the PTO. On this erroneous assumption the Court adopted an entirely new theory of the case, entirely outside the issues presented by the pleadings or the evidence.

2. Denver Avenue Embankment was not designed to repel a wall of water equal to the 1948 flood, whereas it was built as a bridge approach to withstand any high water and was adopted by the appellee to withstand a wall of water 4 feet in excess of the 1948 flood.

3. No one anticipated the breaking of the railway fill although the appellants did and had provided against it.

4. Comparison of dikes. District No. 2 made no effort to strengthen Denver Avenue Embankment although it was more than three times the size of any primary dike and the County and Highway Commission had a written obligation to and did maintain it.

5. Dependence on Denver Avenue Embankment was an afterthought, although appellants had anticipated its need 33 years before the flood and had provided for it to always be maintained and had always relied upon it.

6. No objections were made to the cutting of the underpass, although appellee gave no notice of intention to cut same and strenuous objections were made to the Highway Commission against it.

7. The appellee owed a duty to protect against the underpass but owed no such duty because the appellants failed to protect against it themselves after the appellee had wrongfully cut it.

8. District No. 2 had no right to use the Denver Avenue Embankment although it had an easement therefor, but F.P.H.A. had the right to destroy that easement and to appropriate the embankment for its own exclusive use without any such easement or agreement therefor.

9. The appellants failed to protect against the underpass by construction of dikes themselves, whereas the appellee had made that impossible. The ring dike as built afforded District No. 2 some protection, whereas it was only a concealed trap.

10. Two underpasses were cut through Denver Avenue Embankment and therefore the unbroken embank-

ment was not maintained by the Highway Commission, whereas in each instance the underpass was protected by the Highway Commission and the unbroken protection thus preserved.

11. There was no trespass although the easement of the appellants which was recognized by the appellee was destroyed without authority and because of it all of appellants' lands were inundated.

12. There was no negligence or wrongful conduct on the part of the United States or any of its employees, whereas there is an abundance of evidence that every act taken by the government or its employees was wrongful in the first instance and that they were negligent in every act taken by failing to provide protection for the landowners in District No. 2.

ARGUMENT

Item 1. THE COURT FOUND THAT:

Peninsula District No. 2 adopted as its western protection the railway fills on the west, a mile or two outside the district, and that was the cause of the flooding of district No. 2, although that was not within the issues of the case and is contradicted by the PTO. On this erroneous assumption the Court adopted an entirely new theory of the case, entirely outside the issues presented by the pleadings or the evidence.

In Assignment of Error No. V, referring to Finding of Fact No. 7 (R. 142), the Court said:

> "The failure of the western embankment at District No. 1 was the sole cause of damage to plaintiffs.

> That embankment, a fill designed to carry railroads and owned and controlled by the railroad companies, had been adopted by both Districts Nos. 1 and 2 as one of the flood protective works. * * * "

And in the third paragraph of Assignment of Error No. 1(a) (R. 128) the Court in its opinion said:

> " * * * that the western embankment owned and in control of the railroad be adopted by both Districts as an existing work * * * "

These are copied from the Court's opinion and also assigned as error in our Assignment of Error No. 1(a). As has been shown, the ring levee, built to protect the underpass through the Denver Avenue Embankment, broke some thirty hours after the breaking of the western embankment of District No. 1, the railroad fill. At the time the damage was done to District No. 2 the breaking of the railroad fill and the flooding of District No. 1 was history. It made no difference whatever to the landowners in District No. 2 whether District No. 1 was flooded by the breaking of the railroad fill or by cloudburst or what-not. Peninsula Drainage District No. 1 had been flooded before the cause of action arose, the flooding of iDstrict No. 2. The entire issue in the case is whether Denver Avenue Embankment was protection for District No. 2 from waters coming from the west. There is nothing in the contentions of either party in the PTO and nothing in the evidence, either in the PTO or oral evidence, that would make an issue of the breaking of the railroad fill. There was no evidence submitted or offered in any way with reference to the cause of the

breaking of the railway fill, nor whether the United States was responsible for it.

Likewise there never was any evidence offered that District No. 2 adopted the railway fills as its western protection. There is no reference to the railway fills whatsoever in the organization of District 2 nor in the reorganization, and no evidence whatsoever to support findings that District No. 2 adopted this railway fill as protection on the west nor put any dependence in it whatsoever.

This finding of the Court it would seem stems from Note No. 7 on page 6 of the Court's opinion (R. 132), which reads as follows:

> "The Plan for Reclamation adopted by District No. 2 recited that District No. 1 was protected 'by its west, north and south levees, connecting with system No. 2'. District No. 2 planned to construct levees on the east, north and south. The Plan concluded, 'It is apparent that this will affect a complete closure of the land included in this district against high water.' "

The plan for the organization of District No. 2 was set forth in the pleadings filed in the County Court and in the Court's order (Ex. 26, R. 302). In neither of these was there any mention made of the railway fills nor of Peninsula Drainage District No. 1 or its dikes. In the Court order, on the other hand, it is said (R. 332, 333):

> "The said lands are partly protected from overflow by dikes upon or near the boundaries thereof, and the proposed plan will include such additional dikes and works as will be deemed necessary."

This statement follows the description of the area in which the Denver Avenue Embankment was given as the western boundary, that is, the eastern boundary of the 80 foot strip of ground deeded to the County by Peninsula Industrial Company. There was filed in this proceeding, however, a report by Phillip H. Dater, Engineer (Ex. 27, R. 334). In this report Mr. Dater said (R. 335):

> "Attached to this report is a contour map, Plat 1, showing the physical characteristics of these lands included in District No. 2. The District has for its west boundary the Derby Street fill of the Interstate Bridge, which also constitutes the east boundary of Peninsula Drainage District No. 1 — this fill upon completion of District No. 2 will not act as a dike since District No. 1 will be reclaimed by its west, north and south levees, connecting with system No. 2. It will, however, constitute an additional element of security to Districts No. 1 and 2."

Then after describing the north, south and east boundaries, some two or three paragraphs later, Mr. Dater said:

> "It is apparent that this will affect a complete closure of the land included in this district against high water."

It is very apparent that Mr. Dater's description of the area, concluding with his last statement, is referring to the western boundary as Denver Avenue Embankment and not the railroad fill and dikes around District No. 1. The reference to this embankment or fill not acting as a dike after the construction of the dikes around District No. 1 was entirely and clearly a parenthetical statement. What he said was entirely obvious. That is, that after District No. 1 constructed dikes on its north,

south and west there would be no water against the Denver Avenue Embankment. However, until that time it would act as a primary dike while thereafter it would act as a secondary dike. It seems to us there can be no misunderstanding of this Engineer's report but the Court has misconstrued it to give it an entirely different meaning, in that District No. 2 was adopting District No. 1's dikes and the railway fills as its western protection.

As a matter of fact District No. 1 never completed the dikes which Mr. Dater said were "to be built". They built dikes on the south and north but on the west they built no dikes or levees whatever as anticipated by Mr. Dater, but instead hooked on to railway fills over which they had no control whatsoever nor any right of improvement or maintenance and there was no contract with the railroad that its fill could be used as a dike or that the railroads would maintain it or that they could hook onto it. As a matter of fact these railway fills had never been subjected to side water pressure until the building of these dikes by District No. 1 (PTO R. 38). It would seem that the railroad company could have at any time forced the disconnection of these dikes so as to relieve the railway fills from this side pressure which they were not built to withstand.

If there could have been any doubt as to what District No. 2 was relying upon as its western boundary and protection, any and all such doubts would be completely dispelled by the reorganization of District No. 2, which took place in 1928 (PTO R. 25, 27). At that time the Supervisors of District No. 2 applied to the Probate De-

partment of the Circuit Court of Multnomah County which took over the jurisdiction of the County Court of Multnomah County under the Statutes of Oregon. By this petition it was recited that the Denver Avenue embankment had been built to a height of 33 feet (R. 26) whereas their outside dikes were only 28 feet. They recited that landowners in the District had applied to the Supervisors to increase the height of these outside dikes to 33 feet to match Denver Avenue Embankment. In this petition there was no mention made whatsoever of District No. 1 nor any of its dikes or the railway fills.

Following this petition and the order of the Court allowing the same, the landowners of the District were assessed $25 per acre (PTO R. 27) for the expense and thereafter the District with the aid of the government built up the outside dikes to a minimum height of 33 feet, a maximum of 35 feet (PTO R. 21). During the same period the culvert through which Peninsula District No. 2 had temporarily drained its surface waters into No. 1 and there pumped them into Columbia Slough through a joint pumping plant was entirely plugged. It was plugged by the W.P.A. under government engineers' supervision (Ex. 66, p. 11; PTO R. 27). District No. 2 then drained its surface waters to the south side along Columbia Slough and pumped them over the dike at that point. From then on there could be no possible contention that District No. 2 had any dependence whatever on any of the works of District No. 1 nor that it did not look entirely to the Denver Avenue Embankment as its western protection regardless of how District No. 1 might be flooded.

We also want to call the Court's attention to the plat attached hereto as Appendix A. This plat shows the area making up Districts Nos. 1 and 2 and is a composite map made from "Exhibits Nos. 1 and 2" of the Districts separately. This map on the reduced scale is 1600 feet to 1 inch. By looking at this map it will be observed that without Denver Avenue Embankment there would never be any connection between the dikes around District No. 1 and District No. 2. In the first place there is an 80 foot strip of land between the two iDstricts which was occupied by Denver Avenue. In the second place the south dike of District No. 1 meets Denver Avenue considerably north of the south dike of District No. 2. It follows that without the Denver Avenue Embankment there would have been no "circumvolution" of the area in District No. 2 by the dikes of the two districts, Nos. 1 and 2. Without the existence of the Denver Avenue Embankment neither of the districts would have had any protection whatever.

We also wish to call the Court's attention to the provision in the PTO (R. 29, 30) which said:

> "West of the highway fill supporting Denver Avenue lies Peninsula Drainage District No. 1. The levees of that district provide protection for Peninsula Drainage District No. 2 *in the sense that in the absence of a failure of one or more of those levees flood waters can not approach Peninsula Drainage District No. 2 from the west.*" (Emphasis ours)

This provision of the PTO we believe negatives any idea that any dependence was put in the dikes of District No. 1 or the railroad fills except that it recognized that

so long as there was no break in those fills or dikes the Denver Avenue Embankment would not be subjected to water pressure.

In Assignment of Error No. VI, taken from Finding of Fact No. 8 (R. 142), it is said:

> "* * * No reliance was placed on Denver Avenue, and Denver Avenue is mentioned only casually as furnishing additional protection."

We are unable to understand what the Court means by saying that the embankment was only "casually" mentioned. It was described in the organization papers, the petition and order, and in Mr. Dater's report as the western boundary. At least as much emphasis was put on to the Denver Avenue Embankment as any other border of the District. The railroad fill on the other hand, which the Court has determined District No. 2 was relying on for western protection, was never mentioned at all in the proceedings at any time and the dikes around District No. 1 if they had been built, were only mentioned as preventing water from approaching the Denver Avenue Embankment until such time as such dikes failed.

In the reorganization proceeding the entire emphasis was put on the Denver Avenue Embankment when it was said that the embankment had been built to a height of 33 feet and it was desired to build the outside dikes to an equal height. And when that was followed by the plugging of the culvert through Denver Avenue being temporarily used for drainage purposes there could be no clearer showing that District No. 2 put its entire dependence upon the Denver Avenue Embankment. And

why shouldn't they, with the Denver Avenue Embankment being so much greater in strength than any other dike or embankment, with the County and Highway Commission having the obligation to maintain it, and with the necessity of maintaining it against high waters for the protection of its highway approach to the bridge.

In the fourth paragraph of Assignment of Error No. 1(a), in the Court's opinion (R. 132), we find the following:

> "District No. 2 adopted the western embankment as one of its guards against overflow, as it did the other works which primarily defended District No. 1.[7] This the District had a legal right to do under the statutes of the state.[8] The breaking of the western embankment upon which these landowners relied for safety was the sole cause of disaster."

Approximately the same wording is carried further into Finding of Fact No. 3 (R. 140), our Assignment of Error No. 2.

The Court there said:

> "This the District had the legal right to do under the Statutes of the State." Citing in Note 8 in the Opinion Oregon Laws 1915, Chapter 340, Sec. 29, ORS 547.315.

This Section cited by the Court provides a connection may be made by one district with the works of another but in order to do so a written consent must be obtained from the district or a court order procured. In this case there was no consent, there was no court order, and there was no intent, actual or implied, to adopt any of the dikes or works of District No. 1 when District No. 2 was organized nor in its organization.

In addition to that the railway fills upon which the Court determined District No. 2 relied were from one to two miles west of District No. 2, were never any part of the dikes of District No. 1, and District No. 1 could not have given any consent nor could any court order have provided that District No. 2 could rely upon such railway fills. These fills were entirely within the control of the railway company. District No. 1 had no right to maintain, improve, repair the same, nor to rely upon nor to hook onto them. The evidence shows that they are merely hooked on to these railway fills with their north and south dikes without any right to do so whatsoever and without any right to rely upon the railroads to maintain them, and no right to depend upon them (PTO R. 40). District No. 1 apparently considered that for this small area of swampland it was better to take the risk of the railroad company's fills being sufficient for their protection rather than to go to the enormous expense of building a long dike along the west side. This undoubtedly accounts for the fact that District No. 1 remained largely a swampland until taken over by the government for the temporary housing project. It is shown in the opinion in Clark vs. U. S. 109 Fed. Sup. 213, at p. 222, that the government owned approximately 80% of the entire district. The strength and efficiency of the Denver Avenue Embankment, however, and the obligation of the county and state to maintain the same likewise accounts for the reason that District No. 2 was almost, if not entirely and completely developed and improved.

So far as counsel are able to determine the above are the factual findings upon which the District Court announced the new theory that

"THE FAILURE OF THE WESTERN EMBANKMENT AT DISTRICT NO. 1 WAS THE SOLE CAUSE OF DAMAGE TO PLAINTIFFS."

We believe we have shown that none of these findings are supported by the evidence. In fact that they are contradicted by the agreed evidence.

As it appears to us the only assumption upon which this theory could be made would be the assumption that Denver Avenue Embankment had been destroyed by the wrongful act of F.P.H.A. and a flooding of District No. 1 would necessarily flood No. 2. But when you make this assumption you admit the plaintiff's entire case.

The only inkling we can get as to why the District Court adopted the theory that the breaking of the western embankment, the railway fill, was the cause of the disaster and the questions involved in these cases were identical, is that the Court wrote a very exhaustive opinion, in fact two opinions, on the Vanport cases involving the damage to residents in District No. 1. These opinions reflect a very exhaustive study of the facts involved in those cases. In that case the breaking of the western embankment, the railway fill, was the principal and practically the only issue involved. It seems to counsel that in writing the opinion in these cases the Court has confused the issues with the Vanport cases and adopted the same issue. This made it necessary to eliminate Denver Avenue Embankment completely one way or another,

and this has been done by findings of fact that are entirely contradictory to the PTO.

So far as we can see there is not the slightest similarity between the issues involved in the Vanport cases and in these cases. In fact the District Court itself recognized this in the Vanport case. We call the Court's attention to the case of Clark vs. United States, reported in 109 Fed. Sup. at page 220, in which the Court said, and we quote:

> "So an attempt has been made by each plaintiff to show that the United States, in some of its manifestations, was under duty to maintain the embankments surrounding Vanport. The ground should be cleared first. *Denver Avenue fill broke after Vanport was flooded, so no causal connection between that incident and any property damage here complained of can be established.* * * * The remaining embankment was not constructed, owned or maintained by the United States. This fill had been made by two railroads at various times, not as a water repellent structure, but for the purpose of carrying trains in regular course of operation." (Emphasis ours)

So it would seem that the Court itself recognized that there was "no causal connection" between the issues in the two districts. However, the opinion in these cases apparently recognizes no difference.

In the same paragraph and in the same case as just above quoted, the District Court said in referring to this identical railway fill,

> "This fill had been made by two railroads at various times, not as a water repellent structure but for the purpose of carrying trains in the regular course of operation."

So in the Clark case the District Court held that this railway fill or western embankment was nothing but a railway fill designed to carry trains and not a dike, whereas in the instant case it has apparently held that it was a dike adopted by both Districts Nos. 1 and 2.

This is only one more of many inconsistencies, contradictions, and unsupported statements of fact upon which the Court adopted its new theory which was never thought of by either the appellants or the appellee and never presented. The appellants submit that they are entitled to a determination of this case upon the theories and issues presented by them.

Item 2. THE COURT FOUND THAT:

Denver Avenue embankment was not designed to repel a wall of water equal to the 1948 flood, whereas it was built as a bridge approach to withstand any high water and was adopted by the appellee to withstand a wall of water 4 feet in excess of the 1948 flood.

In Assignment of Error No. I(b), paragraph 4, (R. 130) the Court said:

> "But no one contemplated Denver Avenue as a bulwark against the weight of water such as was cast against it when the western embankment broke."

This is repeated in Assignment of Error No. VII.

In Assignment of Error No. VI we find the following:

> "Denver Avenue, the boundary between the two districts, was not intended to be a levee and was not designed as a water-repellent wall or structure."

In this contention the Court contradicts itself both in the opinion and in the findings of fact, and it is also contradicted by the government's expert witnesses, Mr. Middlebrook and Mr. Turnbull.

In Finding of Fact No. 5 (R 141) it is said:

> "The purpose of this ring levee was to afford some protection to District No. 1 from overflow by flood water from the east if the dikes of District No. 2 (which were lower than those of District No. 1) were overtopped."

Approximately the same language is found in the Court's opinion. Mr. Middlebrook and Mr. Turnbull testified the purpose of the ring dike was to protect District No. 1 from overtopping of the dikes surrounding District No. 2 because those dikes were built to a height of 33 feet or 1.7 feet lower than the dikes around No. 1 (R. 225 and 239). The ring dike was only a link in the protection afforded by the Denver Avenue embankment and under the theory of these experts the ring dike would have been no value whatever unless the balance of the Denver embankment was sufficient to withstand a wall of water of 33 feet and above that to the height of the ring dike of 34.7 feet. This would be about 3 feet higher wall of water than was experienced in 1948. It follows that if the ring dike was built for the purpose for which these experts testified, and the purpose stated by the Court in its opinion and findings, that it had to be anticipated that the Denver Avenue embankment was sufficiently water repellent to withstand a wall of water much higher than was experienced in 1948.

We also want to call the Court's attention to the purpose for which the Denver Avenue fill was constructed. It will be remembered that it was constructed for a highway to approach the bridge and was built over ground that was subjected to certain annual high waters and to more or less regular heavy floods. It was intended to be and was constructed as one unbroken, continuous embankment running across this low ground. It was built to a considerable height prior to the organization of either District No. 1 or District No. 2, and prior to the dikes being built around either District (PTO R. 22). Under these circumstances this embankment necessarily had to be built to a height that would top any anticipated flood waters and be sufficient in strength to repel the same. Otherwise the embankment and the highway would have gone out annually with every high water. Besides the contract with the landowners required construction to "as far as possible duplicate" the bridge approach to the Columbia River bridge (PTO R. 23). The Court we believe will recognize that a bridge approach would be worthless if it was not water repellent. If it was not so built it would be a violation of the contract by the County. However, if the Court will refer to Item 4 herein for the comparison of dikes it will readily be seen that this embankment was over three times the size of the largest section of any of the outside primary dikes and built in the same manner and of the same materials. Also, it will be seen that it was nearly twice the size of the section of the railway which gave way and of better materials and better construction. Yet the Court found

that District No. 2 relied on the railway fill, a mile or so outside the district and over which it had no control or rights, and not on Denver Avenue embankment on its border which was nearly twice the size and strength and for which it had a written easement.

Finally the Denver Avenue embankment did stand up against this wall of water in the 1948 flood which the Court said it was not intended to do.

But even if this embankment had not been sufficient to withstand the wall of water produced by the 1948 flood which it did; even if it had not had the strength to protect the United States dollar investment against a wall of water up to 34.7 feet as was anticipated by the appellee's expert witnesses; even if the Court had been right in anticipating the embankment to be sufficient to withstand a wall of water up to 34.7 feet if coming from the east upstream with the force of a heavy current behind it but not sufficient to stand up against a wall of back-water up to 31 feet coming from the west, downstream; even so, regardless of its strength and efficiency, District No. 2 landowners owned a portion of the embankment and had a written easement to make use of the entire embankment and were entitled to whatever protection it might afford.

It seems nothing less than absurd to the appellants that this decision would be based on such inconsistency.

In U. S. vs. Florea, 68 Fed. Sup. 367, at p. 374, the Court said:

> "Neither private individuals nor government agents could escape notice of the fact that these lands would be of no value without diking protection."

So far we have not called the Court's attention to the testimony of any of the expert witnesses except the government's witnesses. We do, however, wish to call the Court's attention to the testimony of Mr. F. R. Schanck (T. R. 165 and 256 and pages following) and to Mr. Felix Zeidlack (T. R. 204 and pages following). These were both well qualified engineers. They both testified that the Denver Avenue embankment was sufficient to withstand the sudden flood up to its full height of 37.6 feet. They both testified that the ring dike was inadequate and Mr. Schanck testified that the ring dike was not sufficient to stand up against a much lower water than was experienced. This testimony is undisputed. The government engineers' testimony showed that they anticipated that the embankment was sufficient to withstand a flood up to a height of their ring dike of 34.7 feet.

Item 3. THE COURT FOUND THAT:

No one anticipated the breaking of the railway fill although the appellants did and had provided against it.

In paragraph 9 of the findings of fact (R. 143) set forth in our Assignment of Error No. VII, it is said:

> "In the exercise of due care, there was no reason to anticipate a failure of the western embankment or any embankment of District No. 1, and hence no reason to anticipate that flood waters would ever approach Denver Avenue and the ring levee from the west. * * * The failure of the ring levee and the

> inundation of the plaintiffs' property resulted from a set of circumstances unforeseen by anyone, including plaintiffs, and which in the exercise of due care could not have been foreseen."

No evidence was introduced by any one having knowledge of the railway fills as to whether a breakage there might be anticipated. That issue was not in the case. The issue was entirely as to whether District No. 2 had the right to rely on the Denver Avenue embankment and whether that protection was wrongfully destroyed. Undoubtedly thousands of witnesses could have been subpeonaed and asked the question, whether they had any reason to anticipate a breaking of the railway fill and whose answers would necessarily be "no" because they had no information in reference to it. This is a far cry from the statement that there was no reason to anticipate a breakage and that it could not be foreseen.

As appellants see it, it would make no difference in any event whether such a breakage could have been foreseen or anticipated. If the landowners in the District provide themselves a secondary dike for their protection regardless of how strong the dikes around the adjoining districts may be, or whatever protection they might have, they are entitled to maintain that protection. A third party could gain no right to cut that protection and destroy it merely because that third party did not anticipate the breakage of dikes in the adjoining districts, nor would it make any difference how many people could not foresee a breakage of these dikes.

However, the original owners of this property and their successors certainly anticipated that there could be such a break and all during the years the Denver Avenue embankment was preserved and maintained to protect them against any emergency. Evidently the landowners of District No. 1 also anticipated that there could be such a break, as must be inferred from the fact that this District was never developed, at least the major portion of it, until the appellee constructed its housing project. They well should have anticipated such a possibility by reason that the District had no control whatsoever over this railway embankment and no right to repair, maintain or strengthen it or to hook on to it, and the railroad companies having the control of it had no obligation whatsoever to maintain it for the protection of District No. 1, as was the case with the County and the Highway Commission as to the Denver Avenue embankment. Engineer Schanck (T. R. 256) testified that the Denver Avenue embankment was "very much more effective" than the railroad fills.

The forethought of the landowners in District No. 2 to guard against the breaking of dikes in adjoining districts were fully and well justified by the finding of government engineer Diblee in his flood or completion report (Ex. 66; R. 445) in which he recommends many things that should be done to secondary as well as primary dikes to guard against future floods, including the elimination of this underpass through Denver Avenue embankment. No one can read Mr. Diblee's report without recognizing that there may always be anticipated a break in either a primary dike or secondary dike, re-

gardless of its strength and efficiency. Also that every feasible guard should be made against such a break and no guards should be removed or destroyed.

What possible right could the appellee gain to destroy District No. 2's dike simply because it or anybody or any number of people had no reason to anticipate the breaking of the railway fill in the adjoining District?

Item 4. THE COURT FOUND THAT:

District No. 2 made no effort to strengthen Denver Avenue embankment although it was more than three times the size of any primary dike and the County and Highway Commission had a written obligation to and did maintain it.

COMPARISON OF DIKES

The Court in its opinion and in our Assignment of Error VI (R. 142) said:

> "Neither District No. 1 nor District No. 2 ever spent time or money in attempting to strengthen Denver Avenue."

It will be remembered that the landowners in this area conveyed the right of way to the County in consideration of the County and its successors maintaining the fill and embankment. There is no showing as to the value of this land but if it had been protected on both the east and west as is maintained by the Court's opinion, this land would have been of very considerable value. There was set aside for highway and for the toes of the fill a strip of ground 317.6 feet in width and a mile or two in length. This made a very considerable consideration for the maintenance of the fill by the

County and its successor, the Highway Commission, especially as it had to be maintained in any event.

Now as to the failure of the diking districts to do anything to strengthen this embankment or to request the government to do so. It would seem proper here to make a comparison of this embankment with the outside and primary dikes and the S. P. & S. Railway fill, as follows:

ikes	Base Width	Crown Width	Height	Side Slope	Original Construction
ver Ave. bankment O R. 22)	317.6′	92′	37.6′	1′ on 3′	Dredged
th Levee O R. 21)	90′ to 100′	12′ when no road. 20′ to 30′ with road on top	33′ to 35′	1′ on 2′ riverward 1′ on 3′ and 1′ on 4′ landward	Dredged
th Dike on to ver O R. 21)	70′	12′	33′ to 35′	1′ on 2′	Dredged
t of Union O R. 21)	100′	12′	33′ to 35′	1′ on 3′	Dredged
t Levee O R. 21)	100′	12′	33′ to 35′	1′ on 2′ riverward 1′ on 3′ landward	Dredged
g Dike O R. 50)	100′	12′ to 7.5′	34.9′	1′ on 2′ and 1′ on 1½′	Dry sand
way Fill O R. 58)	172′	32′	46.37′	1′ on 1¾′	Dry sand

The above tabulation shows the original construction. Subsequently the government improved a part only of the outside dikes and used clay and silt from

borrow pits (PTO R. 21). The ring levee was subsequently improved by placing a three foot clay embankment on the east side only to protect against water from the east only (PTO R. 52). The Denver Avenue embankment was built only to 33 feet by 1928 which is shown in the reorganization of District No. 2 (PTO R. 26). Thereafter the height was raised by the State Highway Commission to 37.6 feet but there is no showing as to what materials were used (PTO R. 22). It will be noticed that the only two embankments which washed out in the flood, the railway fill and the ring dike, were the only ones built from dry sand.

Now let us make some comparisons of these dikes as follows:

First: Let us compare Denver Avenue embankment with the north levee, that being the strongest dike in construction, the largest in size with a road over the top, and on the Columbia River side subjected to the greatest hazard. This comparison shows that the Denver Avenue embankment was 3.176 times larger in base width than the north embankment at its widest point. It shows the Denver Avenue embankment was in excess of three times the crown width of this north embankment at its widest point. The original construction was the same, being dredged from the river or slough.

This comparison shows that it would have been nonsense and useless for District No. 2 to have requested the strengthening of the Denver Avenue embankment or to undertake it themselves. They had a contract with the County and the Highway Commission

to maintain this embankment and it was well done. It was built to maintain the bridge approach over swampland that was subject to being overflowed and necessarily sufficient in height and sufficient in strength to withstand any anticipated flood and it gave far greater protection than any outside dike.

Second: Now compare the Denver Avenue embankment with the railroad fill which washed out. Here the Denver Avenue embankment was almost twice the width at the base as the railway fill and almost three times the width at the top. It had side slopes almost double. The railroad embankment was subject to heavy traffic by the railroad companies. The Denver Avenue was subjected to heavy traffic by highway. The Denver Avenue embankment was dredged whereas the railroad embankment was made from dry sand over piling. The County and Highway Commission were under contract to maintain the embankment and it was expected to be subject to side water pressure. When the railway fill was built it was not subject to side pressure (PTO R. 38) and neither District had the right to so subject it.

Third: Now compare the ring dike with the outside dikes around District No. 2. The ring dike was shown to be 100 feet at the base. The outside dikes 100 feet with the exception of a part of the south dike which was only 70 feet. The crown width was 12 feet on all outside dikes with the exception of the north dike on Columbia River which was from 20 to 30 feet. The ring dike was 12 feet. This comparison in size makes

it very obvious why the landowners in District No. 2 assumed that the ring dike was sufficient for their protection as it was about the same size. The difficulty, however, was that there were many hidden defects in the ring dike which could not be observed by a layman and could only be determined by an engineer after thorough investigation. These hidden defects were as follows:

(1) The ring dike was built of day sand (PTO R. 50).

(2) There was a clay bank placed on the east side for the protection against water coming from the east only, whereas no similar protection was given for its west side to protect from water coming from the west (PTO R. 52).

(3) A concealed culvert was run under and through this ring dike for the purpose of draining water from west to east from Peninsula Drainage District No. 1 to Peninsula Drainage District No. 2. There was a floodgate on the east side to prevent water entering this cluvert from the east but there was no similar floodgate on the west to prevent water from running from west to east (PTO R. 52, 53). It was this culvert that probably started the washing out of this rink dike (Ex. 66, quoted in Statement).

(4) There was a water pipe run through this ring dike of considerable size (Ex. 66, quotation in Statement).

(5) Cracks and sloughs appeared in this ring dike

which the Housing Authority employees covered over so they could not be seen by the ordinary observer (PTO R. 54, Tr. R. 200, Ex. 32 R. 364). However, at the time of the flood this crack apparently showed up (Ex. 66, R. 449).

This comparison it seems to us shows very clearly why no greater fuss was created by the landowners in District No. 2 during the period between the building of the ring dike and the flood, there being nothing which they could observe to indicate that the ring dike was not built for their protection.

Fourth: Now compare the Denver Avenue embankment with the ring dike which was built at the same spot and the same elevation. The Denver Avenue embankment is shown to be 3.176 times in width at the base than the ring dike. Denver Avenue is shown to be 7½ times in crown width as the ring dike at its widest point. The Denver Avenue embankment has slopes of 1 and 3 as against 1 on 1½. The Denver Avenue embankment was dredged, whereas the ring dike was made of dry sand. The Denver Avenue embankment was necessarily built to withstand side water pressure from either side, whereas the ring dike was built to withstand pressure only from the east side. The ring dike was also subject to the many hidden defects above mentioned.

The Statutes of the State of Oregon, Sec. 123-216, O.C.L.A., ORS 551.140, required the appellee to afford equal protection to District No. 2 when it cut the underpass.

So it clearly appears that the Denver Avenue embankment was a "monster" when compared to any dikes in the District. Yet the Court held that is was entirely worthless except for the protection of the appellee's investment against the overtopping or breaking of the outside dikes to the east.

Item 5. THE COURT FOUND THAT:

Dependence on Denver Avenue embankment was an afterthought, although appellants had anticipated its need 33 years before the flood and had provided for it to always be maintained and had always relied upon it.

The Court, on page 3 of its opinion (R. 130) set forth in Assignment of Error No. 1(b) said (Paragraph 3):

> "This is a case of after-thought, not forethough, on the part of plaintiffs and District No. 2."

Just how the Court could arrive at this conclusion is hard to conceive. It seems to the appellants that there could hardly be a case where more forethough was shown by the original owners of this property. It will be remembered that the deed given by Peninsula Industrial Company to the County was given about two and one-half years before the organization of either District No. 1 or District No. 2, at a time when the property was unprotected by dikes. The highway was constructed but not to its ultimate height during that period. The Peninsula Industrial Company forsaw at that time, thirty-three years before the flood, that if an embankment duplicating the bridge approach and unbroken was built across this swamp land it would

necessarily have to be sufficient in height to top any of the annual floods which might be anticipated and which were always certain to come. Also, that it would have to be built, as bridge approaches usually are, to withstand the water pressure, otherwise the highway would have been washed out annually. The Peninsula Industrial Company foresaw that this sort of an embankment with a highway over it carrying heavy traffic continually and with it having to be maintained by the County and its successors that it would make an excellent protection against flood water. They had the foresight to provide just such an embankment and their right to use it. It was thereafter continually maintained until destroyed by the cutting of the underpass by the government and was continually used for flood protection.

There is no evidence whatever that would justify any conclusion that the right of the landowners to rely upon this embankment as a western protection was an afterthought.

Item 6. THE COURT FOUND THAT:

No objections were made to the cutting of the underpass, although appellee gave no notice of intention to cut same and strenuous objections were made to the Highway Commission against it.

In Assignment of Error No. III, referring to Finding of Fact No. 4, (R. 141) we find this statement:

> "No protest against construction of the underpass was made by District No. 2. A resolution mildly suggesting objections to the construction of the underpass without a stop-log structure was passed

> by its board of directors, but it seems never to have been called to the attention of anyone outside that group."

Just what rights the government could obtain to cut an underpass through Denver Aveune embankment thus destroying the protection of District No. 2 by reason of it not being objected to, it is not explained, although counsel for appellee seem to make quite a point of it. Examining the facts, however, we find there is no justification for this finding. So far as the F.P.H.A. was concerned no notice whatever was given to District No. 2 or either District of any intention to cut any such underpass, nor any opportunity for them to object. They began cutting this underpass under contract on the 2nd day of November, 1942, ten days before they procured a permit from the State Highway Commission (PTO R. 49). So far as the F.P.H.A. is concerned their action was another Pearl Harbor. They simply started cutting the underpass without any authority or negotiations whatsoever with the District.

On October 26, 1942, at the annual meeting of the landowners of Peninsula Drainage District No. 2, we find in their minutes (Ex. No. 29 R. 341) the following:

> "Considerable discussion ensued concerning the underpass between Kaiserville and Peninsula Drainage District Number One and our District. It was decided that the Union Avenue right-of-way has no connection with our district and it is up to the United States Engineers and the State Highway Commission to adjudicate any differences concerning the effect on the drainage by the construction of this underpass."

The minutes of the meeting of the Board of Supervisors of District No. 2 under date of November 2, 1942 (Ex. No. 30, R. 343) reveal the following action taken by the body:

> "Considerable discussion ensued concerning the underpass at Kaiserville on Denver Avenue. It was decided that our attorney Mr. Phipps write a letter to the Oregon State Highway Commission to see if this matter could not be rectified so that our drainage system would not be disrupted."

At the special meeting of the Board of Supervisors of April 19, 1943, we find the following (Ex. No. 31, R. 343):

> "It was suggested that the Secretary also write the Oregon State Highway Commission and the U.S. Engineers, advising them that the underpass on Denver Avenue, at Vanport, may cause trouble in case of a flood by dividing Districts #1 and #2, and that Denver Avenue serves as a dyke between the two Districts. The Board of Directors feel that a stop-log should be erected on this underpass."

Mr. Phipps in his testimony (Ex. No. 35) testified that he contacted Mr. Baldock of the State Highway Commission, he being at that time the President of District No. 1, as well as attorney for District No. 2. Mr. Phipp's testimony shows that he struggled with the Chief Engineer of the Highway Commission, Mr. Baldock (Ex. 35, R. 427, 429), complaining about the underpass but that Mr. Baldock arbitrarily refused to recognize that the District had any rights in the embankment. Mr. Phipps in this testimony (Ex. 35, R. 427) said:

> "I took it up with the State Highway Department. I made objections, both orally and in writing, to the Highway Department with reference to the underpass. I maintained the Highway Department had no right to cut a hole in our dike, and I always understood that Denver Avenue was one of the dikes of the District."

Mr. Baldock in his testimony (TR. R. 251, 255), acknowledged that Mr. Phipps had complained. He acknowledged that he knew that both Districts claimed the Denver Avenue embankment as a dike but denied that they had any right to do so. At the same time he admitted that he had not seen the agreement contained in the deed by which the County acquired the highway, that is, the deed giving the Districts the right to use the Denver Avenue embankment. Mr. Baldock tried to hedge somewhat about the claims of District No. 2, but it must be remembered at that time the damage had been done; that no one in District No. 1 had any claim to the failure of the Denver Avenue embankment because the water came from the west, whereas the landowners in District No. 2 were at that time making claims for damages.

The evidence shows that there was no action that could have been taken and no objection that could have been made on behalf of District No. 2 to prevent the construction of the underpass short of a suit to enjoin. Also, that the construction was started and completed so rapidly that there was little time for such an action. The evidence also shows that the F.P.H.A. started building the ring dike almost immediately. It must be inferred from this that the landowners in Dist-

rict No. 2 assumed that this dike was being built for the protection of both Districts, particularly since the statutes placed that duty upon the one cutting the underpass. It is well settled law in the State of Oregon that inferences of this nature are sound evidence, Donis vs. Sawyer's Service Inc., 143 Or. 433. So it would seem that the appellee has nothing to rely upon or support this contention, and in any event no rights could be obtained to do something unlawful and wrongful merely by failure of the affected party to object.

Item 7. THE COURT FOUND THAT:

The appellee owed a duty to protect against the under pass but owed no such duty because the appellants failed to protect against it themselves after the appellee had wrongfully cut it.

On the seventh page of the Court's opinion (R. 134) set forth in the sixth paragraph of Assignment of Error No. 1(b), the Court said:

> "It is true that one who destroys a dike against flood waters would be liable for damage proximately caused thereby. But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything with either Denver Avenue or the western embankment. * * *"

And in the seventh paragraph of Assignment of Error No. 1(b), the Court in its opinion said (R. 137):

> "Here, the United States is not liable. The government owed no duty to these landowners."

In Assignment of Error No. VI, the Court said in its Finding No. 8 (R. 143):

> "Neither Multnomah County, the State of Oregon, the United States nor anyone else has or had any obligation to maintain Denver Avenue for flood protection purposes."

And in Assignment of Error No. VIII, referring to Finding No. 10 (R. 144), it is said:

> "District No. 2 and not the United States had the duty of providing flood protection for lands within the District. District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands."

And in Assignment of Error No. XIII, referring to Finding No. 16 (R. 146), the Court said:

> "The United States has proved facts sufficient to establish that it had no duty to protect plaintiffs or their property, that nothing done or left undone by the United States or its employees constituted a violation of any right of plaintiffs, and that there is no proof of any wrongful act or omission on the part of the United States or its employees."

No mention whatever is made of the Statutes of the State of Oregon which provided for such duty (Section 123-216 O.C.L.A., ORS 551.140). No attempt is made either by the appellee or the Court's opinion or its Findings to answer this provision of the Statute except by ignoring it. This Section as found in O.C.L.A. refers to irrigation districts but is made applicable to Drainage Districts by Section 123-206. This section of law is quoted in the Statement of the Case but it is short, and for the convenience of the Court is here copied again:

> "REALIGNMENT OF DIKES BY LANDOWNER: PROCEDURE: EXPENSE: OWNERSHIP OF NEW DIKE. Any person through whose lands dikes shall have been constructed under this act may be allowed to construct a dike upon new lines between any two points on the original line. In such case the owner shall file application with the county court, giving a plat of the proposed change, and indorsed by the superintendent of the district. If the court is satisfied that the change is not detrimental to the district, the application shall be granted. The applicant shall construct the new dike at his own expense, and up to the standard of the original, of which fact the superintendent shall be the judge. The dike thus constructed shall become the property of the district in the same manner as the original, and subject to the same regulation, and the right of way of the original dike thereon becomes vacated."

In addition to this section of the statute making it incumbent upon one cutting the dike to provide substitute and equivalent protection, the Court, it seems to us, contradicts itself when it said, on page 7 of its opinion (R. 134), as follows:

> "It is true that one who destroys a dike against flood waters would be liable for damage caused thereby."

Thus the Court seems to adopt the strange theory that while the United States would be liable for damages for having destroyed the dike (the Denver Avenue embankment) it had no such liability because the appellants themselves did nothing to protect it. This, in spite of the fact that the government had made it ompossible for the landowners themselves to protect against the underpass by taking all of the ground on

the east side thereof on which a ring dike could be constructed. The alternative thereto, as suggested by the Court, being the condemnation of the railway fill and reconstruction thereof. That would require the foresight to determine where the break would occur. A difficult undertaking.

The right designed to protect against interference with dikes was discussed in Loveless vs. Ruffcorn, 143 Iowa 221, 121 N.W. 1034, wherein the Court said:

> "In the spring of 1858 certain legal proceedings were had before the County Judge of Harrison County under a statute then in force providing for the construction of the levee in question for the general purpose above indicated. By such proceedings a highway was also established along the line of the levee in question; the embankment of the levee being also the traveled grade of the highway. In pursuance of such proceedings the levee in question was constructed, and has always been known as the "noyes Levee." Its north end began at the north line of the land now owned by appellant, at some distance west of his northeast corner, and extended in a southerly direction, bearing slightly to the west for a distance of one mile and a quarter. Its southern terminus was therefore a quarter of a mile south of the south line of the land now owned by the appellant. The embankment was constructed to a height of two feet, and without any opening of its full length, and it has been so maintained for the 50 years. It has always been effective for the purpose of its construction, and has always protected the land on either side from the overflow of water. That it has always been accepted and acquiesced in by the several owners of the land contained in the tract is without substantial dispute. That such long acquiescence in such levee as a part of the drainage scheme of the

locality is effective to confer rights upon landowners protected thereby is settled by our previous decisions. * * * Whether the tile drain so laid would have the effect of transferring flood waters from one side to the other we have no occasion now to consider. From the evidence in this record it would be very difficult to reach a satisfactory conclusion. Appellant has no legal right to cut the levee, even temporarily, and thus endanger the property of his neighbors. He suggests no method, nor purpose on his part, to lay such tile without cutting the levee."

We wish to call the Court's attention to Contention No. 23 of the appellee set forth in PTO (R. 96, 97):

"That the law regards flood waters as a common enemy against which each person is entitled to protect himself as and to the extent he sees fit and with no obligation to protect any other person; that the ring levee adjacent to the Denver Avenue underpass was intended to protect the Vanport residents and the $25,000,000 investment of the United States in Vanport in the event that the primary levees of Peninsula Drainage District No. 2, which were lower than those of Peninsula Drainage No. 1, were overtopped by flood waters; that plaintiff, althought he had no rights in connection with the construction or maintenance of the ring levee, was greatly benefited by its existence."

We agree with this statement of the law to the effect that any person has the right to protect himself against flood as and to the extent he sees fit. He may do so, of course, so long as he does not harm others by his acts. Also, he would owe no duty to a third party to make his protection benefit that third party, unless, as in this case, he owed a duty to that third party for some other reason, such as destroying of the Denver Avenue embankment in this case. It follows, also, that if one party

provides such protection for himself to such an extent as he sees fit, no third party would have the right to destroy that protection by cutting underpasses through it or otherwise.

This contention on the part of the appellee seems to set forth just the law that the appellants are contending for. Appellee has attempted no explanation as to why the appellants did not have the same rights as the appellee to provide for themselves such protection against floods as they see fit and to such an extent as they might see fit. In this case the appellants had provided themselves with the protection afforded by Denver Avenue embankment. Under the appellee's contention above set forth, as well as under the appellant's theory of the case, the appellants had a perfect right to provide this protection for themselves. It follows that the appellee would have no right to destroy that protection.

In this case it will be remembered that the appellee completely destroyed the protection provided by the appellants for themselves and adopted that same protection for their own exclusive use to protect their own dollar investment. We can see no reason why the same legal rights would not apply to the appellants as well as to the appellee. Neither can we see that it would make any difference whether the embankment was built or maintained or sufficient for a dike so long as the appellants had the right to rely on it.

Item 8. THE COURT FOUND THAT:

District No. 2 had no right to use the Denver Avenue embankment although it had an easement therefor, but F.P.H.A. had the right to destroy that easement and to appropriate the embankment for its own exclusive use without any such easement or agreement therefor.

Attempts were made in the findings to prove that District No. 2 had no right to rely on the Denver Avenue Fill. These seem to stem from the quotation of the lower court appearing in Note No. 10 at the bottom of page 6 of the Court's opinion (R. 133, 134) set forth in Assignment of Error I(b). In this note the Court quotes from the deed given by Peninsula Industrial Company to the County of Multnomah conveying the right of way. The Court quotes from that as follows:

> " * * * This conveyance is made upon the following express conditions: * * * (a) * * * Multnomah County shall * * * construct * * * a fill and embankment * * * and shall * * * provide and thereafter maintain a public highway [thereon] * * *."

Here again the words taken from the provisions of the deed are accurate but by leaving out the meat of that provision the quotation emasculates the agreement. The provision of the deed from which these words were taken read as follows:

> "(a) That said *Multnomah County shall* within three years (3) from the date of this conveyance *construct* or cause to be constructed, and thereafter maintain upon that part of the tract of land hereinafter described as Parcel B, which is north of the north bank of Columbia Slough, *a fill and embankment* which shall as far as possible duplicate the fill and embankment to be constructed by said Multnomah County upon Parcel A as des-

> cribed herein, the west side line of the crown of said fill or embankment to coincide substantially with the west side line of said Parcel B *and shall* within said period *provide and thereafter maintain a public highway* over said Parcel B which shall be reasonably sufficient for the accommodation of public travel thereove * * *."

(We have emphasized the works taken from this and quoted by the Court above.)

It is readily seen from this that the agreement was to within three years construct and thereafter maintain an embankment which, by other parts of the deed, the grantors had the right to use. The grantors were not interested particularly in a highway but were willing to grant the right of way on condition that the County would construct its roadway upon an embankment, not a trestle, that it would do so within a period of three years, and after that it would thereafter maintain the same. No arguments should be necessary to show that the Court's interpretation of this contract is contradicted by the PTO.

It will also be remembered that the same deed provided for mutual easements. The County owned only an 80 foot strip, whereas the Highway and the embankment had a width of 317.6 feet at the base, the toe of the fill being upon private owned property. It remained as private property until that portion of it upon which the ring dike was built was taken over by the government for the purpose of building the ring dike. Even though the title to this portion of it would be in the government, it would still remain private property for

the purpose of this proceeding. This would leave 118.8 feet on either side of the fill on private property and within the District, with the easement to use the entire fill. When the government took over this property for the purpose of building this ring dike it expressly took it subject to the District's easement (Ex. 78, R. 471).

It shouldn't be necessary to go into the question of the rights of the abutting owners to highways in view of this specific agreement, this easement and this privately owned portion of the fill. However, even without any of this it is the contention of the plaintiff that the abutting owners would have the right to depend upon this embankment for any purpose not inconsistent with its use as a highway *thereover*. We do wish, however, to call the Court's attention to the statement of the law on this point, set forth in 125 Am. Jur. p. 432, Sec. 135, which is as follows:

> "Where the fee is in the abutting owner, his title is not a contingent interest or a mere expectancy, but is a present subsisting ownership of the fee. He has full dominion and control over the land, and all the rights of an absolute owner of the soil, subject only to the easement and servitude in favor of the public. He may use the land for his own purposes in any way not inconsistent with the public easement, and is entitled to all profit and advantage which may be derived therefrom. But his right in the street or highway as a highway in so far as respects the right of passage and travel thereover is simply equal to and in no sense greater than that of the general public."

Many cases are cited by this authority in support of this, but since in this case the appellants had in addi-

tion a specific agreement to make use of the fill further citations should seem to be unnecessary.

The Court seemed to take the position that District No. 2 had no right to use Denver Avenue embankment although it had an easement therefor with a contract providing it should be maintained. But on the other hand, the F.P.H.A. had the right to destroy this easement and the protection afforded to District No. 2 and to appropriate the embankment for its own exclusive protection. And this without any contract.

Item 9. THE COURT FOUND THAT:

The appellants failed to protect against the underpass by construction of dikes themselves,whereas the appellee had made that impossible. The ring dike as built afforded District No. 2 some protection, whereas it was only a concealed trap.

In Finding No. 4 (R. 141), Assignment of Error No. III, the Court said:

> "For the convenience of persons living in both districts an underpass through Denver Avenue Fill was built with federal funds."

There is no evidence whatever that this was built for the convenience of District No. 2. The circumstances contradict this statement. There was no way of passage through this underpass from one district to the other because it was blocked off by the ring levee built for their own protection. Therefore, there was no possible use which District No. 2 could make of this underpass and no possible grounds upon which it can be said it was built for the convenience of District No. 2.

In the Court's opinion (R. 128) Assignment of Error I(b), third paragraph, the Court said:

> "However, upon protest of District No. 1, a ring levee was built."

This is refuted in the Contentions of the United States, Contention No. 23 (PTO R. 96), where it is said:

> "That the ring levee adjacent to Denver Avenue Underpass was intended to protect the Vanport residents and the $25,000,000 investment of the United States in Vanport * * *."

It is also contradicted by the evidence of Mr. Phipps (Ex. 35, R. 429), wherein Mr. Phipps testified that he objected strenuously to the Highway Commission as to the construction of the underpass. At that time he was the President of the Board of Supervisors of District No. 1 and he was also attorney for District No. 2. He objected to the construction of any underpass without adequate protection equivalent to the highway embankment. The United States at that time owned the major portion of District No. 1 upon which it constructed its housing project. However, the underpass was entirely built for the interests of the government and protection which it gave to the balance of District No. 1 was only incidental, and the construction of the underpass was made over their protest.

As set out in Assignment of Error No. I(b), fourth paragraph, in the Court's opinion (R. 130), the Court said:

> "The government did not construct or have control over Denver Avenue or the bypass, although this was built with federal funds * * *."

This statement is contradicted by Ex. No. 23 (R. 293) which was a contract between the Highway Commission and F.P.H.A. In that contract the F.P.H.A. specifically agreed to construct this bypass and the Highway Commission agreed to furnish plans for the same and to maintain it during the period of the war at the expense of F.P.H.A., after which there was no arrangement or agreement as to its maintenance. This contract, we believe, shows that this was entirely constructed for a private way to the housing project; that F.P.H.A. had full control over it at all times, which is contradictory to the above quoted statement.

On page 7 of the Court's opinion (R. 134) set forth in the sixth paragraph of Assignment of Error No. 1(b), the Court said:

> "But for six years after the underpass was cut and the ring levee constructed, the Drainage District, which had the continuous duty of maintenance, strengthening and repair, did not do anything either with Denver Avenue or the western embankment. All this time, the District possessed sovereign power of eminent domain and assessment for these express purposes."

About the same language appears in Finding No. 10 (R. 134) our Assignment of Error No. VIII, and we find this additional language from the Court's opinion (R. 144):

> "District No. 2 had ample opportunity after the Denver Avenue underpass and the ring levee were constructed to provide further flood protection for district lands."

Now let us analyze these statements. The Court seems to suggest two ways in which this underpass could have

been protected and that it should have been done by District No. 2. We know of no other way that it could have been done except as was suggested by the Court, 1st, by the condemning of the railway fills upon the west side of District No. 1, a mile or two west and outside of the District and being in the hands of the railroad condemnation, repair and reconstruction of those railroad fills which were a mile or two in length. Being outside of District No. 2. This would have required the companies, we can see no possibility of the district having any right of eminent domain which would have permitted this action even had the District been in a position to go to this enormous expense. The appellee owned the major portion of District No. 1, in fact approximately all of the District which had been improved and also owned a considerable portion of District No. 2. Since with these holdings the appellee did not attempt to rebuild or strengthen this railway fill, can it be assumed that it would have been willing to pay its proportion of that expense or was it the District Court's idea that the balance of the District should assume this burden?

The other suggested way was to build a ring dike around the underpass within the boarders of District No. 2. This property had already been condemned and taken over by the United States. The only property upon which a ring dike could have been built for this purpose. The United States took this for the very purpose of building a ring dike and did build one thereon for the apparent intent and purpose of building a ring dike for the protection of both Districts, sup-

posedly for the purpose of fulfilling the duty imposed by the Statutes of Oregon upon the United States to substitute equal protection with the highway embankment. There was nothing in the construction of this ring dike which would put a layman on notice that it was built for the protection of waters coming from the east only and for the protection of the government's housing project only. In any event we do not believe that the District would have any right of eminent domain that would take property from the United States government or the railroads.

In the Court's opinion, page 3 (R. 129), set out in the third paragraph of Assignment of Error No. 1(b), the Court said, beginning in the middle of the paragraph:

> "As is readily seen, this fill, including the ring levee, could have been strengthened as a part of the work which was then being done upon the other protective works of the two districts by the United States engineers."

As to the highway embankment, it has already been pointed out that it was over three times the size and strength of any outside primary dike and that it had been subjected to heavy highway traffic for a period of about thirty-three years over the top, so there was no necessity and no reason for asking further strengthening of the highway embankment and undoubtedly the government engineers could not have been convinced any such strengthening was necessary even if it had been requested. In addition to that there was a definite spe-

cific contract on the part of the County and Highway Commission, its successor, to maintain it.

As to the failure to request the Government's Engineers to strengthen this ring dike while the work was being done on the primary dikes, the difficulty is that the work performed by the government engineers on the primary dikes in District No. 2 were completed in 1940 (R. 22) and neither this underpass nor the ring dike were constructed by F.P.H.A. until the last of 1942 and the first part of 1943. It was some two or three years before the underpass was even thought of. Elsewhere in the opinion the Court made the same comment as to the failure of District No. 1 to request the strengthening of the ring dike while their primary dikes were being strengthened by the government. The same applies to this. The work done by the government on the primary dike was completed in 1941 (R. 34) or two years before the underpass and ring dike were thought of.

In the same paragraph the opinion of the Court (R. 130), which is set forth in the third paragraph of our Assignment of Error No. 1(b) the Court further said:

> "This ring levee did in fact afford some protection to the lands of District No. 2, since it delayed the waters which rushed into District No. 1 when the western embankment failed."

The delay between the breaking of the railway fills and the ring dike was thirty hours. The principal damage resulting to the appellants was to their real properties and their improvements thereon. Just what bene-

fit this delay could have been to these appellants so far as their real property is concerned it is impossible to conceive. As we see it, it made no difference to the appellants and the damage that resulted to them whether the dike broke on May 30th between 4:00 and 4:30 P.M. or 9:00 P.M. on May 31st. It might have afforded some small opportunity to remove some personal property and to save their own lives and the lives of their children who might have been in school if it had not been a holiday. But for these no damage is claimed. It will be remembered that during this period the State officials had taken over and ordered all residents and all parties out of the District.

In Lawrence vs. Tucker, 160 Or. 474, 85 P. (2d) 374, it was held that a person cannot justify a trespass upon another person's property by showing that such trespass resulted in a benefit to the owners of the property upon which the trespass was committed. This was a drainage case.

Item 10. THE COURT FOUND THAT:

Two underpasses were cut through Denver Avenue embankment and therefore the unbroken embankment was not maintained by the Highway Commission, whereas in each instance the underpass was protected by the Highway Commission and the unbroken protection thus preserved.

As set forth in appellants' Assignment of Error No. I(b), paragraph 1, the Court said in its opinion (R. 129), as follows:

> "The State Highway Commission which had already constructed two underpasses[2] in Denver Avenue * * *."

And in Note No. 2 on page 3 of said opinion (R. 129) referred to in this quotation, the Court said:

> "One of these was not within the boundaries of the levee systems of Districts Nos. 1 and 2, and the other affected the system in no way but to lower the Denver Avenue fill by four feet."

Here again the Court has omitted the meat of the evidence. The evidence as to these two underpasses constructed by the Highway Commission was placed in the PTO by the appellants for the very purpose of showing that this fill had always been considered as a continuous protection. The Court has cited them as proving the opposite. The PTO shows that the underpass at the south end of the fill, which the Court said was not within the boundaries of the levee system, was actually within the boundaries of District No. 2 but in constructing this underpass the Highway Commission moved the south dike considerably to the north and there reconnected it with Denver Avenue embankment in order that the underpass could be placed outside of the dikes. The PTO sets forth that the protection of Denver Avenue fill was thereby maintained (PTO R. 29).

The other underpass referred to by the Court was at the north end in connection with the traffic interchange which the Court says only resulted in lowering the fill by 4 feet, thus indicating that there had been no intention to protect this underpass. It is set forth in the PTO, however (R. 28), that the Denver Avenue Fill was protected from this underpass by using high ground and filling in from Union Avenue to North Portland Road and from Denver Avenue to North Portland

Road, with the result that the Denver Avenue Fill and embankment was only lowered approximately 4 feet. This left the embankment 33.6 feet or a little in excess of the lowest of the dikes surrounding District No. 2, thereby giving the District the same protection as its outside dikes. Without this filling by the Highway Commission for the very purpose of protecting District No. 2, the embankment would have been lowered to a height less than the outside dikes.

Item 11. THE COURT FOUND THAT:

There was no trespass although the easement of the appellants which was recognized by the appellee was destroyed without authority and because of it all of appellants' lands were inundated.

In paragraph 7 of Assignment of Error No. 1(b), the Court said, in its opinion (R. 137):

> "No liability was thus established by creating a highly dangerous situation. These were flood waters and were not part of a column of water which agents of the government were conducting when the break occurred. So there could be no trespass."

The Supreme Court of Oregon has adopted the theory of trespass with regard to water cast upon another's land:

> Lawrence vs. Tucker, 160 Or. 474, 85 P. (2d) 374;
> Boulevard Drainage System vs. Gordon, 91 Or. 240, 177 P. 956, 178 P. 796.

It has been pointed out in a previous decision of this Court, Clark vs. United States, 109 F. Sup. 213, that there is a duty irrespective of fault or intention incum-

bent upon the owner of land who impounds thereon an element, harmless in itself, but which has an inherent tendency to break destructively out of bounds, to confine the force within his own boundaries.

With the above stated duty unquestionably goes the correlative duty to not interfere with or destroy the barriers erected by the persons seeking to protect their property from damage by water, which barriers are adequate for the purpose intended, and used and relied on for that purpose.

In the present case there were two trespasses. The first was the severance of Denver Avenue and the second was the invasion of the waters coming from Peninsula Drainage District No. 1. The second trespass was the natural result of the first. This Court said in Ure vs. United States, 68 Fed. Sup. 779:

> "When one voluntarily and deliberately does an act upon his own land which results in a physical trespass upon lands in other ownership, the liability is absolute."

In Clark vs. United States, 109 Fed. Sup. 213, at page 220, the Court said:

> "It is true, under certain conditions, an individual might be bound to others to maintain a dike or embankment at all events. If so, such a person might be liable in trespass for damage resulting from a break therein. Likewise, as an interesting Oregon case holds, one who in time of flood releases water from his own dam in the headwaters and thereby accelerates the flow or increases the force of a flood is properly held liable for the damage resulting from his act, but whether in trespass or no we would not debate."

Item 12. THE COURT FOUND THAT:

There was no negligence or wrongful conduct on the part of the United States or any of its employees, whereas there is an abundance of evidence that every act taken by the Government or its employees was wrongful in the first instance and that they were negligent in every act taken by failing to provide protection for the landowners in District No. 2.

In Assignment of Error No. X, Finding No. 13 (R. 145), it is said:

> "Plaintiffs have failed to prove any negligence or that plaintiff suffered damage on that account."

In many places in the opinion and in the findings similar language is used, all of which is assigned as error, but it would seem unnecessary to point out each such instance.

It has been shown that the F.P.H.A. cut the underpass through the Denver Avenue embankment without any authority whatsoever except a permit from the Highway Commission; that the Highway Commission had no authority over this embankment except the 80 foot strip which it used for the highway and that was subject to the easement of both districts to use the same. Also, subject to the Highway Commission's and the County's obligation to maintain it. No attempt was made to procure the consent of District No. 2 nor to petition the Court for an order permitting such cutting as required by the statutes of the State of Oregon. It was cut in spite of the fact that the government had taken the land upon which the ring levee was placed subject to the easement of District No. 2 which it destroyed. It has been shown that

after the destruction of this protection for District No. 2 the F.P.H.A. with no right whatsoever seized the entire protection of Denver Avenue embankment for its own personal use to protect its own investment, and with no intention whatsoever of protecting District No. 2 which had relied upon it for some 31 years. It has been shown that the ring dike constructed by the F.P.H.A. was done for its own personal protection and not for any one else; that the ring dike was inadequate for protection from waters from the west; that it was not equal to the protection of Denver Avenue embankment which was cut, as was required by the statutes of the State of Oregon and which placed a duty upon it to provide such protection. It has been shown that the ring dike was not kept in proper repair; that F.P.H.A. was notified by their own employees that the ring dike was inadequate, resulting only in a scolding of the employees for their interference. It has been shown by the expert witnesses of the government, Mr. Turnbull and Mr. Middlebrook, that the F.P.H.A. anticipated that Denver Avenue embankment was sufficient to withstand a wall of water 4 feet in excess of that experienced in 1948 by their testimony that the ring dike was built for the protection of the government's investment in District No. 1 against the overtopping of Peninsula District No. 2's dikes which were at a minimum of 33 feet. This testimony was given by men who had no connection with the construction of the ring dike.

No evidence was offered on the part of the government by anyone having actual knowledge as to why the ring dike was built and for what purpose. The evidence of

these two experts while it necessarily showed that they anticipated that the Denver Avenue embankment was sufficient to retain a wall of water up to 37.4 feet, nevertheless their testimony must be seriously questioned from the fact that the Denver Avenue embankment had been lowered at the time of the cutting of the underpass at the traffic interchange on the north by 4 feet making the maximum height of Denver Avenue embankment 33.6 feet, or approximately the same height as the outside dikes around No. 2. It is very obvious that if Denver Avenue embankment at its lowest point was the same height as the outside dikes around District No. 2, that the construction of the ring dike up to 34.7 feet would be useless as against the overtopping of the outside dikes around District No. 2. If the water rose that high it would also top the Denver Avenue embankment at its lowest point.

Even the Court remarked at the trial that the testimony of these expert witnesses was inconsistent (Tr. R. 241). As we see it, the only conclusion that can be drawn from these expert's testimony is that they knew that the Denver Avenue embankment was so constructed and of sufficient size to withstand a wall of water to its maximum height; they knew that in time of flood there is always a danger of an unexpected break in primary or secondary dikes; they knew that all the landowners in Districts Nos. 1 and 2, including the United States, had the right to depend on and use this embankment against flood protection; but in order to find some excuse for the F.P.H.A. appropriating this entire embankment for its own exclusive use in pro-

tecting its own dollar investment, destroying its protection for the landowners in District No. 2, they jumped on to the mere coincidence that the ring dike was 1.7 feet higher than the outside dikes around District No. 2. They therefore testified the ring dike was built only for the protection against the overtopping of those dikes. They ignored the fact that the Denver Avenue embankment had been lowered at one point to 33.6 feet, the approximate height of the outside dikes. They ignored the fact that if the outside dikes were overtopped the Denver Avenue embankment would also be overtopped and the added height of the ring dike would be no protection for their dollars investment.

We believe therefore the only conclusion that can be drawn is that the ring dike was built to provide against the possible breaking of an outside dike to protect only the dollar investment of F.P.H.A. and that the rights, lives and properties in the heavily populated District No. 2 was totally ignored. It follows that if this ring dike was built against the possible breaking of the outside dikes of District No. 2 that they should have been very much more aware of a possibility of a break of the dike and railway fills surrounding District No. 1 for the reason that on the west they were protected only by railroad fills which they had no right to use or protect or repair, and no one had control of them except the railway companies which were not interested in preserving them for diking purposes.

Finally it was testified by Mr. Turnbull, one of the government's expert witnesses, that while the govern-

ment did not ordinarily construct secondary dikes that it was unsound to take one out that was already there (Tr. R. 244). Also, Mr. Diblee, the government engineer, in his completion or flood report recommended that for further protection the underpass should be eliminated.

It would seem unnecessary in view of this abundance of evidence of wrongful and negligent conduct to invoke the doctrine of res ipsa loquitor but in Clark vs. United States, 109 Fed. Sup 213, at p. 220-221, the Court said:

> "Under Oregon law, where a person has complete control of an instrumentality and owes a special duty to a plaintiff, the doctrine of res ipso loquitor establishes a prima facie case if it is shown that the damage was caused by occurrence which was unexpected and which would not have taken place if there had not been some defect in the instrumentality."

It is inconceivable how it could be found that there was no wrongful or negligent act on the part of any governmental employee and that it was the duty of Drainage District No. 2 to protect itself against this underpass in spite of everything that has been done by the F.P.H.A. to make this impossible.

ARGUMENT AS TO CONCLUSIONS OF LAW

In the Court's Conclusions of Law it adopts the Conclusions of Law set forth in the opinion. In the opinion and in the findings the Court found:

1. That the Court had jurisdiction of these cases under the Federal Tort Claims Act (Conclusions of Law, R. 146).

2. The Court in its opinion, page 7 (R. 134) found:

> "It is true that one who destroys a dike against floodwaters would be liable for damage proximately caused thereby. * * *"

3. On page 7 of the Court's opinion the Court found (R. 135):

> "* * * It is true that it has been held here that an employee of the Portland Housing Authority can by wrongful act or omission bind the government in damages. * * *"

4. Also, in the Court's opinion, page 7 (R. 135), the Court found:

> '* * * Also, where the government acts in creating a situation on land under its control which would be held negligent under the laws of the particular state if done by a private corporation, the government can be held liable under the statute. Furthermore, the particular agent who performed the act or was guilty of the omission need not be pointed out and proved by name. Where such an act or omission is proved, responsibility cannot be escaped simply because there was a choice of means exercised by some government office or agent. The exercise of administrative discretion as a result of 'policy judgment and discretion' may free the

> government from liability in handling explosives necessary for national defense in time of war. But the application of such a principal here or in the case just mentioned would emasculate the statute and return us to the day when the sovereign could do no wrong."

These pronouncements of the legal points involved seem to cover about every legal principle involved. Since appellants agree with these pronouncements and no cross appeal has been taken, there should seem little necessity for arguments as to legal principles.

All there remains to be done is to apply these pronouncements of the law to the facts in the case. This should not be difficult. Practically all the evidence is contained in the PTO which is not subject to judicial or other variation, and there was little or no material dispute in the oral evidence. Our trouble is that the District Court adopted as findings all the factual statements in the opinion as well as the PTO. This leaves the findings as we see it merely a mixture of contradictions and inconsistencies.

In Conclusion of Law No. 5, our Assignment of Error No. XV (R. 146) the Court said:

> "Under the law of Oregon the legal duty to protect plaintiff's property from flood damage rested on Peninsula Drainage District No. 2 and on plaintiffs themselves as landowners within the District. This duty was continuous and involved the repair, maintenance and strengthening of existing flood protection structures. Neither the United States nor its employees owed plaintiffs any duty to protect plaintiffs' land from overflow or flood damage."

Now let's analyze this statement. As appellants see it a drainage district is merely an association of landowners subject to the same hazard. Their right as an association to build dikes for their mutual protection is a privilege, not a duty. They can build dikes of any strength they wish, adequate or not adequate. These dikes are protected against interference by anyone by the laws of Oregon whether they be weak or strong. There is no duty on the association, however, to build any. If there be any such duty, it would be to themselves only.

As between the landowners themselves, however, each landowner has the duty to its neighbors not to destroy or interfere with any of these dikes. If a dike be located on any one landowner's property, he can apply to the Court for the privilege of relocating it but is placed by Statute under the duty to the balance of the District to substitute equal protection. The District Court would reverse this and make it the duty of the balance of the District to protect the wrongdoer.

When the United States became the owner of the property in District No. 2 it had no greater and no lesser rights or duties than any private landowner. Therefore, when it cut Denver Avenue embankment it certainly owed the duty to the balance of the District to substitute equal protection. It would be a most peculiar rule indeed to hold that any landowner could cut a dike on his property and it became the duty of the balance of the District, not his, to substitute new protection. If that were the rule, the drainage and irrigation

districts in the Nation should just as well disband. They would have no protection whatever. This is especially true in a case such as the instant case where an apparent substitution was made but with hidden and concealed defects which made it worthless.

In Conclusion of Law No. 6 (R. 147), set forth in appellants' Assignment of Error No. XVI, the Court said:

> "The sole cause of damage to plaintiffs was the failure of the western embankment at District No. 1. The United States was not responsible for the failure of the western embankment and no act or omission of the United States or its employees had causal connection with any damage to plaintiffs' property."

This statement stems from the adoption by the District Court of an issue not presented by the pleadings or the evidence. The facts are discussed in Item 1 of the arguments as to the facts. We call the Court's attention to that argument and particularly to the statement of the District Court in the Vanport cases, Clark vs. United States, supra, wherein the Court said there was "no causal connection" between the breaking of Denver Avenue and the breaking of the railway fill referred to as the western embankment.

In Conclusion of Law No. 7 (R. 147), set forth in appellants' Assignment of Error No. XVII, the Court said:

> "Neither the United States nor its employees has been proved to be guilty of negligence or wrongful conduct within the meaning of the Federal Tort Claims Act."

This Conclusion is of course also based upon facts found by the Court contrary to the undisputed evidence in the case as set forth in the PTO. For argument as to the negligence, we refer the Court to Item No. 12 in this argument as to the facts.

In the Court's Conclusion of Law No. 8 (R. 47), our Assignment of Error No. XVIII, the Court said:

> "The provisions of 33 U.S.C.A. 702(c) that 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place' is an absolute defense to these actions. The statute is valid; it is applicable to the Columbia River Basin; and it is not repealed by the Federal Tort Claims Act."

Even in this Conclusion of Law the question becomes one entirely of fact as the facts in this case do not permit the application of this provision of the statute. Appellants feel that this statute is fully, reasonably and accurately interpretated in the decision of Clark vs. United States, filed February 29, 1954, 218 Fed. (2d) 446, at page 451:

In its opinion the Court said:

> "That section places certain conditions upon federal expenditures in aid of flood control and provides that: 'No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place.' "

Later in the same paragraph in this opinion, it is said:

> "The provisions of 33 U.S.C.A. § 702c barring liability 'from or by floods or flood waters' expresses a policy that any federal aid to the local authorities in charge of flood control shall be conditioned upon federal non-liability. To base recovery here on

any act or omission of the Engineers in assisting in the fight against this flood would run counter to the policy thus expressed. See National Mfg. Co. v. United States, 210 F. 2d 263, 270-75, 8 Cir. 1954, cert. denied, 347 U.S. 967."

The appellants believe that this properly expresses the intention of this statute. It is entirely reasonable that where the government aids a diking district in the building of its dikes or in the fighting of floods, it should not be responsible for damages resulting from any such flood. This distinguishes our case, however, completely. In the instant case there was no aiding by the government as to the improvement of Denver Avenue embankment. There is no issue in the case as to their failure in connection with the flood fight and protection of the ring dike. The entire issue is whether the United States can cut a dike at any place it sees fit not in connection with the building or aiding of any diking district., but for its own private use, and then stand behind this statute and claim no liability.

Even in the act itself it is provided that where construction is undertaken by the government in the building of dikes where it is anticipated that it will cause the flooding of lands not otherwise flooded, then it shall be the duty of the United States to acquire the title of any such land or flood rights thereover. This further expresses what is intended by this statute. That is, the government has no right under this act to do anything they like in the destruction of dikes or otherwise that would cause the flooding of lands which would otherwise not be flooded.

To hold in this instant case that the United States could cut this embankment having the duty under the Oregon laws to protect against it, and with such work done not being in the aid or construction of dikes in any district but for its own exclusive use, would result in the rule that the United States could cut holes in dikes at any place it saw fit for any purpose and would not become liable for damages as a result thereof. And in the words of the District Court, above quoted, would "return us to the day when the sovereign could do no wrong."

Even here, therefore, the application of this statute in this case becomes one entirely of fact and there is no interpretation of the facts in this case that would bring these cases under the provisions of that statute as interpreted by this Court. The District Court was probably intending to apply this rule to the railway fill as he did not recognize Denver Avenue embankment.

The final Assignment of Error as to the Conclusions of Law, Assignments of Error No. XIX and XX, is to the effect that the United States is entitled to judgment and that the Findings of Fact and Conclusions of Law are in accordance with the PTO in the opinion of the Court.

As we have pointed out, these Findings of Fact are not in accordance with the PTO nor in accordance with any evidence submitted orally. And if Findings are made in accordance with the PTO, then judgment must be given to the appellants.

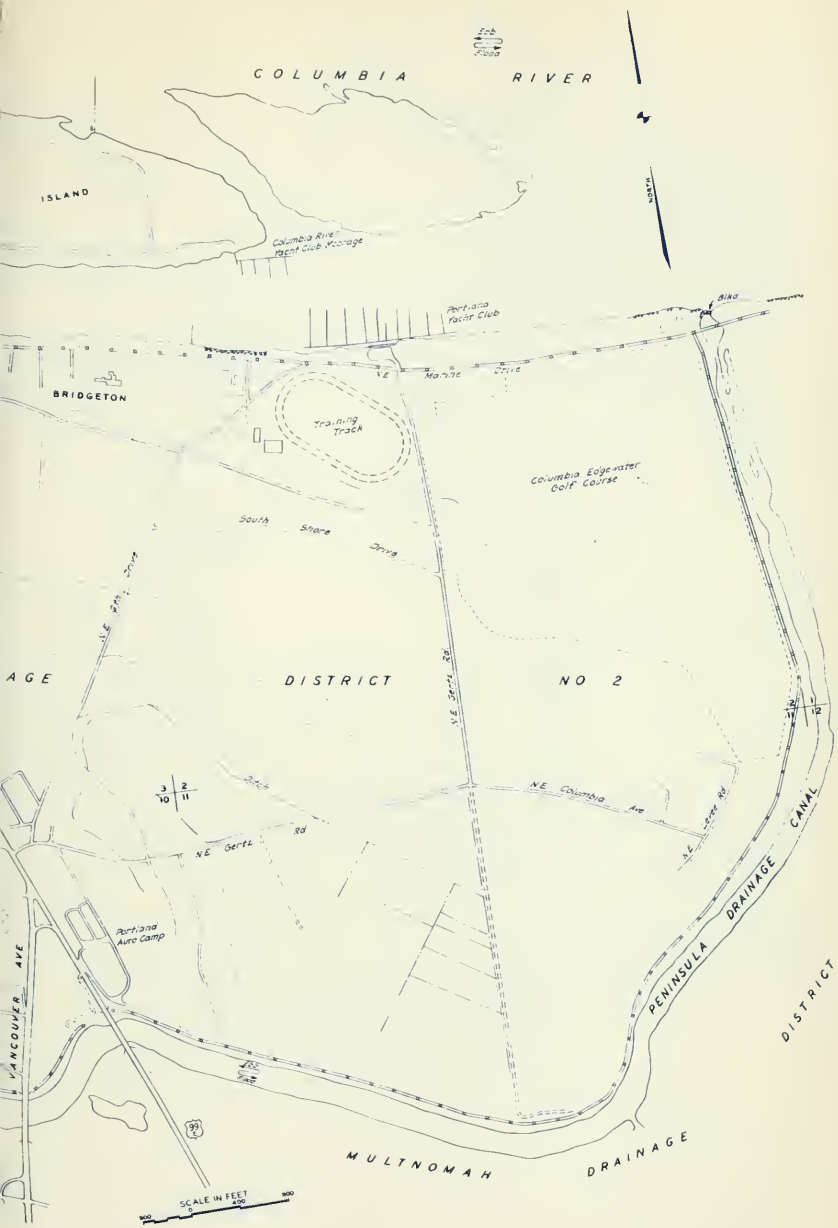
CONCLUSION

We respectfully submit that none of the factual findings upon which the District Court based its decree were sufficient, taken either singly or collectively, to overcome any one of the legal principles pronounced by the District Court above set fort. These factual findings seem to us to be so inconsequental in view of these legal principles that it should hardly be necessary to mention them. However, the Court seems to have placed sufficient credence in these factual findings to overcome the legal principles which must apply. As we see it, these factual findings made by the Court which we maintain are entirely contradicted by the PTO and the undisputed evidence were not considered by the Court so much as avoiding the legal principles involved, as for the purpose of carrying out the Court's new theory of the case that the cause of this damage was the breaking of the railway fill. It would seem that the theme running through the entire decree and findings was to minimize, discredit and eliminate entirely the Denver Avenue embankment from consideration. This is about like hiding an elephant in a broom closet.

Respectfully submitted,

VIRGIL CRUM,
CRUM & SMITH,
WILLIAM C. RALSTON.

APPENDIX A


COLUMBIA RIVER
Ebb
Flood
NORTH
ISLAND
Columbia River Yacht Club Moorage
Portland Yacht Club
N.E. Marine Drive
BRIDGETON
Training Track
Columbia Edgewater Golf Course
South Shore Drive
N.E. 47th Drive
AGE DISTRICT NO 2
N.E. Gertz Rd
N.E. Columbia Ave
Portland Auto Camp
VANCOUVER AVE
PENINSULA DRAINAGE CANAL
DISTRICT NO 1
MULTNOMAH DRAINAGE DISTRICT
SCALE IN FEET


OREGON
SLOUGH
IN PORTLAND HARBOR
COLUMBIA RIVER
TOMAHAWK ISLAND
BRIDGETON
PENINSULA
DRAINAGE
DISTRICT
NO 1
NO 2
VANPORT CITY
FORMER HOUSING AREA
DESTROYED BY FLOOD MAY 30, 1948
COLUMBIA
SLOUGH
PORTLAND
MULTNOMAH
DRAINAGE
DISTRICT
LEGEND

APPENDIX B

Excerpt from Exhibit No. 66, at page 11 thereof, in a portion of this exhibit which was not printed in the Transcript of record, it is said as follows:

> "* * * A search of the side slopes and toes of Denver Avenue was made by these men in an attempt to determine the type and extent of a reported plug of said culvert made in approximately 1940 by means of W.P.A. forces in order to completely separate the pumping operations of the two districts as Peninsula District No. 2 was having a new pumping plant installed at that time, said work being performed under the direction and supervision of the Corps of Engineers. * * *"